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No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding, based on the facts known to it "at this stage of the case," that petitioner's use of force in arresting respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	1
Statement	2
Reasons for granting the petition	10
Conclusion	30
Appendix A	1a
Appendix B	17a
Appendix C	35a
Appendix D	53a
Appendix E	65a

TABLE OF AUTHORITIES

Cases:

Alexander v. *County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995)	12
Anderson v. *Creighton*, 483 U.S. 635 (1987)	*passim*
Bass v. *Robinson*, 167 F.3d 1041 (6th Cir. 1999)	12
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	4
Brown v. *Glossip*, 878 F.2d 871 (5th Cir. 1989)	13, 22
Curd v. *City Court*, 141 F.3d 839 (8th Cir.), cert. denied, 525 U.S. 888 (1998)	26
Ellis v. *Wynalda*, 999 F.2d 243 (7th Cir. 1993)	14, 24
Finnegan v. *Fountain*, 915 F.2d 817 (2d Cir. 1990)	13, 14, 19
Frazell v. *Flanigan*, 102 F.3d 877 (7th Cir. 1996)	14
Gold v. *City of Miami*, 121 F.3d 1442 (11th Cir. 1997), cert. denied, 525 U.S. 870 (1998)	14
Graham v. *Connor*, 490 U.S. 386 (1989)	8, 17, 18, 26, 27, 29
Greer v. *Spock*, 424 U.S. 828 (1976)	2

Cases—Continued: Page

Hammer v. *Gross*, 932 F.2d 842 (9th Cir.) (en banc), cert. denied, 502 U.S. 980 (1991) 7, 8
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 10
Headwaters Forest Defense v. *County of Humboldt*, No. 98-17250, 2000 WL 531004 (9th Cir. May 4, 2000) 15, 20
Hinton v. *City of Elwood*, 997 F.2d 774 (10th Cir. 1993) 26
Holt v. *Artis*, 843 F.2d 242 (6th Cir. 1988) 12
Hunter v. *Bryant*, 502 U.S. 224 (1991) 11, 22, 23, 25, 29
Johnson v. *United States*, 333 U.S. 10 (1948) 21
Jones v. *City of Dothan*, 121 F.3d 1456 (11th Cir. 1997) 26
Karnes v. *Skrutski*, 62 F.3d 485 (3d Cir. 1995) 17
Landrum v. *Moats*, 576 F.2d 1320 (8th Cir.), cert. denied, 439 U.S. 912 (1978) 13-14
Malley v. *Briggs*, 475 U.S. 335 (1986) 10, 11, 21, 27
McGruder v. *Heagwood*, 197 F.3d 918 (8th Cir. 1999) 14
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 22
Napier v. *Town of Windham*, 187 F.3d 177 (1st Cir. 1999) 13, 15
Nelson v. *County of Wright*, 162 F.3d 986 (8th Cir. 1998) 14
Nolin v. *Isbell*, 207 F.3d 1253 (11th Cir. 2000) 26
Oliveira v. *Mayer*, 23 F.3d 642 (2d Cir. 1994), cert. denied, 513 U.S. 1076 (1995) 14, 17
Payton v. *New York*, 445 U.S. 573 (1980) 21
Post v. *City of Fort Lauderdale*, 7 F.3d 1552 (1993), amended, 14 F.3d 583 (11th Cir. 1994) 19
Priester v. *City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000) 19, 24
Rowland v. *Perry*, 41 F.3d 167 (4th Cir. 1994) 14
Roy v. *Inhabitants of City of Lewiston*, 42 F.3d 691 (1st Cir. 1994) 15, 23

Cases—Continued:	Page
Scott v. *District of Columbia*, 101 F.3d 748 (D.C. Cir. 1996), cert. denied, 520 U.S. 1231 (1997)	13
Seekamp v. *Michaud*, 109 F.3d 802 (1st Cir. 1997)	25
Slattery v. *Rizzo*, 939 F.2d 213 (4th Cir. 1991)	13, 14, 15, 22
Snyder v. *Trepagnier*, 142 F.3d 791 (5th Cir. 1998), cert. granted, 525 U.S. 1098 (1999), cert. dismissed, 526 U.S. 1083 (1999)	10, 15
Steagald v. *United States*, 451 U.S. 204 (1981)	21
Street v. *Parham*, 929 F.2d 537 (10th Cir. 1991)	12, 16
Tennessee v. *Garner*, 471 U.S. 1 (1985)	19
Thomas v. *Roach*, 165 F.3d 137 (2d Cir. 1999)	14
United States v. *Albertini*, 472 U.S. 675 (1985)	2
Wilson v. *Layne*, 526 U.S. 603 (1999)	21
Wong Sun v. *United States*, 371 U.S. 471 (1963)	21
Constitution and rule:	
U.S. Const.:	
Amend. I	4
Amend. IV	*passim*
Amend. V	17
Fed. R. Civ. P. 56(e)	28
Miscellaneous:	
Black's Law Dictionary (6th ed. 1990)	28

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Donald Saucier, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 194 F.3d 962. The opinions of the district court (App., *infra*, 17a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1999. A petition for rehearing was denied on January 10, 2000 (App., *infra*, 65a-66a). On March 30, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to May 9, 2000, and on May 1, 2000, Justice O'Connor again extended the time for filing a petition for a writ of certiorari, this time to and including June 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

1. Respondent Elliot Katz,[1] an animal rights activist, brought this Fourth Amendment excessive force claim following his arrest at the Presidio military post in San Francisco. The relevant facts are, for the most part, not disputed.[2] On September 24, 1994, Vice President Gore and other speakers gave a special presentation at the Presidio to celebrate the conversion of that facility, which was then an Army base, into a national park the following week. App., *infra*, 3a. The public was invited to attend. *Ibid.*

On the morning of the presentation, respondent arrived at the Presidio early, intending to display a banner protesting possible use of the Letterman Hospital in the Presidio for experimentation involving animals. App., *infra*, 3a, 18a. Perhaps aware that the Army prohibits the display of political banners on military bases like the Presidio,[3] respondent kept his

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[1] The suit was also brought by respondent In Defense of Animals, an organization of which Katz is president. We use the word "respondent" to refer to respondent Katz alone, except where context indicates otherwise.

[2] Because the case arises on petitioner's motion for summary judgment, we present any disputed facts in the light most favorable to respondent.

[3] See *Greer* v. *Spock*, 424 U.S. 828 (1976); *United States* v. *Albertini*, 472 U.S. 675, 684-686 (1985). Although the Army handed

banner concealed under his jacket as he entered the base and walked to the seating area near the speaking platform. Resp. Dep. 32. Respondent sat down in the front row; at some point, he removed the banner from under his jacket and held it closed on his lap. *Id.* at 32, 35-36; App., *infra*, 4a.

During Vice President Gore's speech, respondent walked from his front-row seat to the waist-high barrier that separated the spectators from the Vice President and began to unfurl his roughly 4-foot-by-3-foot banner. App., *infra*, 4a, 19a, 22a. The banner read: "Please Keep Animal Torture Out of Our National Parks." *Id.* at 4a, 19a. As Katz unfurled the banner and attempted to place it on the barrier, someone "grabbed [him] from behind, and somebody else tore the banner away." *Id.* at 4a, 24a. The two individuals were petitioner Donald Saucier and Sergeant Steven Parker, who were serving as military police. *Id.* at 4a. Petitioner and Parker each took one of respondent's arms and quickly removed him from the seating area. According to respondent, they "started sort of picking me up and kind of walking me out, kind of like very hurriedly." *Id.* at 4a, 25a.

Respondent claims that he was then "shoved" into a military police van located behind the seating area. App., *infra*, 4a, 25a. According to respondent, he nearly fell headlong into the van and was almost injured. *Ibid.* But respondent did not fall headlong into the van. Nor was he injured. To the contrary, respondent caught himself and avoided injury. *Ibid.* After being driven to

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out fliers to potential protestors to advise them of the prohibition, Lee Dep. 24, 30, respondent claims that he never received written notice. Respondent, however, knew that other visitors to the base had been asked to leave when they attempted to circulate handbills and engage in other political activities. Resp. Dep. 67-68.

a military police station, respondent was briefly detained. He was then released, and he drove himself home. *Id.* at 4a-5a.

The events at the Presidio were covered by the news media. As a result, much of respondent's arrest was broadcast on the local news. A videotape of the relevant portions of the broadcasts, which is part of the record in this case, is being lodged with the Court.

2. Respondent brought this action against petitioner and other officials pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that his arrest violated his First and Fourth Amendment rights. Respondent's First Amendment claim and his claim that he was unlawfully arrested without probable cause were rejected by the district court on qualified immunity grounds, and are no longer at issue.[4] This petition concerns his claim

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[4] With respect to the First Amendment claims, the district court concluded that, given "the transitional state of the Presidio on September 24, 1994"—the Presidio was still an Army post—it was not clear whether the Presidio could be considered a public forum. App., *infra*, 5a, 44a. As a result, the court explained, "the rights of protestors at the Presidio were not well established on the date in question, [and] a reasonable military officer could have concluded that preventing protests at the base was Constitutional." *Ibid.* For the same reason, the district court concluded that summary judgment was appropriate with respect to the claim of unlawful arrest. The court explained that, because a reasonable officer could have believed that prohibiting protests on the base was constitutional, a reasonable officer also could have believed that respondent was about to commit a crime when he approached the speaking area and attempted to unfurl a protest banner. *Id.* at 5a, 23a. Finally, the district court concluded that respondent lacked standing to seek declaratory and injunctive relief. *Id.* at 53a-64a. Respondent sought to appeal those rulings, but the court of appeals dismissed the appeal for lack of jurisdiction, *Katz* v. *United States*, No. 98-16121 (9th Cir. Sept. 21, 1998), and respondent did not seek further review.

that petitioner violated the Fourth Amendment by using constitutionally excessive force to arrest him.[5] The district court denied petitioner's motion for summary judgment on that claim, finding disputed questions of fact relevant to both the merits and the question of qualified immunity. App., *infra*, 23a-27a.

The court first examined whether summary judgment was appropriate on the merits, *i.e.*, whether or not the force petitioner used was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." App., *infra*, 24a. The objective reasonableness of force, the district court stated, depends on "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ibid.* After reviewing the descriptions of the events offered by petitioner, Sergeant Parker, and respondent, *id.* at 24a-27a, and the "videotape of television news coverage of the events at the Presidio conversion ceremony," *id.* at 27a, the district court concluded that there was some dispute as to the nature of the risk respondent presented to others. *Ibid.* The court observed:

> Viewed in a light most favorable to [respondent], the videotape shows two officers, on each side of [respondent], removing him from the crowd and

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[5] Respondent asserted a similar claim against the other military police officer who participated in the arrest, Sergeant Parker, and against two supervisory officials, General Glynn C. Mallory and Major Corbin Lee. Parker was never served with the complaint, App., *infra*, 5a, 38a, and the district court granted Mallory's and Lee's motions for summary judgment because respondent produced no evidence linking them to the disputed use of force, *id.* at 30a-34a.

> carrying or pulling him toward the van. Once they arrive at the van, the officers push [respondent] into the van. Given the nature of the crime at issue and the circumstances surrounding the incident, the Court cannot conclude that the use of force was reasonable as a matter of law.

Ibid. Accordingly, the district court denied summary judgment on the merits, concluding that there was a triable issue of fact as to whether petitioner used excessive force to arrest respondent.

The district court also denied petitioner's motion for summary judgment on the issue of qualified immunity. App., *infra*, 27a-30a. Following a "two-prong" inquiry mandated by Ninth Circuit precedent, the district court first concluded that the law regarding the use of force was clearly established at the time the challenged conduct occurred. *Id.* at 28a-29a & n.1. Turning to the "next step" of the inquiry, the district court examined whether "a reasonable officer could have believed that" petitioner "acted lawfully with regard to the degree of force used to remove [respondent] from the crowd and place him inside the van." *Id.* at 29a. In "the Fourth Amendment context," the district court held, "the qualified immunity inquiry is the same as the inquiry made on the merits." *Id.* at 30a. In this case, the district court explained, it had already found that there were disputed facts precluding summary judgment on whether petitioner's use of force was reasonable. *Ibid.* It necessarily follows, the court declared, that petitioner is "not entitled to summary judgment on the basis of qualified immunity." *Ibid.*

3. The court of appeals affirmed. App., *infra*, 1a-16a. The court first rejected the government's contention that it was error to "equate[] the reasonableness test for the defense of qualified immunity with the reason-

ableness test for the merits of an excessive force claim." *Id.* at 8a. Like the district court, the court of appeals explained that, in the Ninth Circuit, the qualified immunity inquiry has two prongs. The first asks whether the legal standard or formula governing the officer's conduct is clearly established. The second asks whether a reasonable officer, applying that standard, could have believed his conduct was lawful. *Ibid.*

In excessive force cases, the court stated, the Fourth Amendment reasonableness test and the second prong of the qualified immunity analysis both focus "on the objective reasonableness of the officer's conduct." App., *infra*, 10a. "Because of this parity," the court concluded, "we have repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Ibid.* (internal quotation marks omitted). The court summarized:

> If genuine issues of material fact as to the amount of force used, or the circumstances that might justify the amount of force used, prevent a court from concluding as a matter of law that the force was objectively reasonable, then a material issue of fact necessarily exists as to whether an objectively reasonable officer could have believed the amount of force used was lawful.

Id. at 12a.

The court of appeals rejected the government's contention that equating the qualified immunity inquiry and the Fourth Amendment reasonableness test is inconsistent with that court's prior en banc decision in *Hammer* v. *Gross*, 932 F.2d 842, 850 (9th Cir.), cert. denied, 502 U.S. 980 (1991), and this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). App., *infra*, 12a-14a. In *Anderson*, this Court rejected the

argument that an officer who conducts an unreasonable *search* in violation of the Fourth Amendment cannot, by definition, have behaved reasonably so as to be entitled to qualified immunity. 483 U.S. at 643. In *Hammer*, the Ninth Circuit rejected the argument that "an officer who has used unreasonable *force* cannot, by definition, have acted reasonably" so as to be entitled to qualified immunity. 932 F.2d at 850 (emphasis added). Noting that this Court had rejected "a similar contention" in *Anderson*, the *Hammer* court explained:

> Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer reasonably could have believed his actions lawful under the Fourth Amendment. *Anderson*, 483 U.S. at 643-44 * * *. To accept Hammer's contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome.

Ibid.

The court of appeals distinguished *Hammer* as addressing the situation, not present here, where the governing legal standard was not "clearly established" because it changed from "shock[s] the conscience" to "objective unreasonableness" when this Court decided *Graham* v. *Connor*, 490 U.S. 386 (1989), after the conduct in question had taken place. App., *infra*, 13a-14a. In a footnote, the court of appeals similarly distinguished this Court's decision in *Anderson*. *Id.* at 13a-14a n.4. That decision, the court of appeals stated, primarily "focuses on the proper formulation of the 'clearly established'" or "first prong" of the qualified immunity inquiry; it does "not address the application of the second prong of the qualified immunity analysis" (*i.e.*, whether a reasonable officer could believe the relevant

conduct lawful), the court continued, "let alone its application in excessive force cases." *Ibid.*

Having concluded that the qualified immunity inquiry does not differ from the test of reasonableness under the Fourth Amendment itself, the Ninth Circuit then turned to whether "the amount of force [petitioner] used in arresting [respondent] was so minimal that it was *per se* reasonable." App., *infra*, 14a. "The question of the reasonableness of force," the court of appeals declared, "is usually a question of fact for the jury," and summary judgment is appropriate only "when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Id.* at 14a-15a n.5 (internal quotation marks omitted). In this case, the court of appeals concluded, the force used was not so minimal as to compel a finding of reasonableness.

The court noted that, according to respondent, petitioner and Sergeant Parker had seized him from behind "without warning or speaking to him," carried him about fifty feet, and forcefully pushed him inside the van. App., *infra*, 15a. On the whole, the court appeared to conclude, that constituted a disproportionate response. "Unfurling a banner," the court of appeals stated, is not a severe crime; respondent was a sixty-year-old man wearing a leg brace; and, "[f]rom all that appears at this stage of the case," respondent was not "armed or dangerous," and "did not pose an immediate threat to the safety of the officers or anyone else." *Ibid.* The court concluded that summary judgment was properly denied, holding that, viewing the facts most favorably to respondent, "no reasonable officer could have believed that the amount of force used was lawful." *Ibid.* The court of appeals denied rehearing en banc. *Id.* at 65a-66a.

REASONS FOR GRANTING THE PETITION

Last Term, this Court granted the petition for a writ of certiorari in *Snyder* v. *Trepagnier*, cert. granted, 525 U.S. 1098 (1999) (No. 98-507), to resolve whether, in an excessive force case under the Fourth Amendment, the same legal standard governs both the question of qualified immunity and the question of reasonableness under the Fourth Amendment itself. That case, however, settled before decision. See 526 U.S. 1083 (1999) (dismissing the writ). This case presents the same issue. In conflict with the decisions of at least six other circuits, the court of appeals below held that the test for qualified immunity and the test of reasonableness under the Fourth Amendment are identical, App., *infra*, 2a, 8a, 10a, 16a, and further concluded that qualified immunity must be denied because the force petitioner employed was not "so minimal that it was *per se* reasonable," *id.* at 14a. The Ninth Circuit's application of the doctrine of qualified immunity to the facts of this case, moreover, effectively creates a de facto no-force rule for many arrests, and invites inappropriate second-guessing of an officer's on-the-spot judgment. Further review is therefore warranted.

1. In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity inquiry is an objective one. Immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were constitutional. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Thus, "if officers of reasonable

competence could disagree on" the lawfulness of the conduct, "immunity should be recognized." *Id.* at 341.

In *Anderson* v. *Creighton*, 483 U.S. at 639, this Court clarified that immunity may not be denied simply because "the relevant 'legal rule'" was "clearly established" at a high "level of generality." Thus, the Court explained, it is not enough to show that the right to be free from unreasonable searches and seizures was "clearly established," or that the applicable legal standard or formula had been settled by the courts. *Ibid.* To the contrary:

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * * but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (emphasis added). The qualified immunity standard thus "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341).

In *Anderson*, this Court also declined to carve out an exception to the qualified immunity doctrine for Fourth Amendment claims, even though both the qualified immunity inquiry and the Fourth Amendment itself incorporate reasonableness tests. 483 U.S. at 643-646. The Court explained that it had previously applied qualified immunity in Fourth Amendment cases, *id.* at

643; rejected arguments based on the coincidence of language in the qualified immunity test and the Fourth Amendment (*i.e.*, that both use the word "reasonable"), *ibid.*; and declared that law enforcement officers who reasonably, but mistakenly, believe their conduct to be consistent with the Fourth Amendment's requirement of reasonableness "should no more be held personally liable in damages than should officials making analogous determinations in other areas of law," *id.* at 644.

a. Notwithstanding *Anderson*, the courts of appeals are divided on whether the qualified immunity inquiry is superfluous in Fourth Amendment excessive force cases. In the decision below, the Ninth Circuit held that it is. "[T]he inquiry as to whether officers are entitled to qualified immunity for the use of excessive force," that court held, "is the same as the inquiry on the merits of the excessive force claim." App., *infra*, 10a (quoting *Alexander* v. *County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995)).[6] That holding accords with decisions of the Sixth and Tenth Circuits. See *Street* v. *Parham*, 929 F.2d 537, 540, 541 n.2 (10th Cir. 1991) (once factfinder determines that "the force used was unnecessary under the circumstances, any question of objective reasonableness" for qualified immunity purposes "has also been foreclosed"); *Holt* v. *Artis*, 843 F.2d 242, 246 (6th Cir. 1988) (similar); *Bass* v. *Robinson*, 167 F.3d 1041, 1051 (6th Cir. 1999) (similar).[7]

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[6] See also App., *infra*, 2a ("[W]e have held that the reasonableness inquiry on the merits of a Fourth Amendment excessive force claim is the same as the reasonableness inquiry posed by a qualified immunity defense."); *id.* at 8a ("[W]e have equated the reasonableness test for the defense of qualified immunity with the reasonableness test for the merits of an excessive force claim."); *id.* at 16a (similar).

[7] The D.C. Circuit has also stated that "whether an officer used excessive force and whether an officer is entitled to qualified im-

The First, Second, Fourth, Fifth, Eighth and Eleventh Circuits, however, have reached the opposite conclusion. Those courts of appeals have concluded that, in excessive force cases, the test for qualified immunity differs from the substantive test of reasonableness under the Fourth Amendment. *Finnegan* v. *Fountain*, 915 F.2d 817, 822-823 (2d Cir. 1990) (even if officer exerts "constitutionally excessive force," qualified immunity is appropriate unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive"); *Slattery* v. *Rizzo*, 939 F.2d 213, 215 (4th Cir. 1991) ("There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim."); *Brown* v. *Glossip*, 878 F.2d 871, 873 (5th Cir. 1989) ("We can discern no principled distinction between the availability of qualified immunity as a defense to unreasonable searches * * * under the fourth amendment and as a defense to an excessive force claim also grounded in the fourth amendment."); *Napier* v. *Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999) (because officer "*could have reasonably believed*" that the force "was justified and lawful," he was, "under the standard enunciated in *Anderson*, * * * entitled to qualified immunity * * *, whether [there was] a viable Fourth Amendment violation or not"); *Landrum* v. *Moats*, 576 F.2d 1320,

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munity" is "determined according to a single standard." *Scott* v. *District of Columbia*, 101 F.3d 748, 759 (1996), cert. denied, 520 U.S. 1231 (1997). The actual standard used by the D.C. Circuit, however, implicitly recognizes the possibility of different outcomes regarding *excessiveness* under the Fourth Amendment on the one hand and the *reasonableness* of an officer's *belief* in the lawfulness of the conduct on the other. In particular, the D.C. Circuit asks whether "*the excessiveness* of the force is *so apparent* that *no reasonable officer* could have believed in the lawfulness of his actions." *Ibid.* (emphasis added; quotation marks omitted).

1327-1328 (8th Cir.) ("The defense of good faith is not * * * inapplicable to an action based on excessive force."), cert. denied, 439 U.S. 912 (1978);[8] *Gold* v. *City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) (lawfulness of non-deadly force analyzed on a "case-by-case basis," but qualified immunity appropriate "unless application of the [excessive force] standard would inevitably lead a reasonable officer in the defendant's position to conclude that the force was unlawful") (internal quotation marks omitted), cert. denied, 525 U.S. 870 (1998).[9] That division in appellate authority, repeatedly

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[8] See also *McGruder* v. *Heagwood*, 197 F.3d 918, 920 (8th Cir. 1999) ("objectively reasonable police officers could have believed that they were not using excessive force, though this belief may have been erroneous"). Other Eighth Circuit cases, however, have treated the issue as if it were unresolved. See, *e.g.*, *Nelson* v. *County of Wright*, 162 F.3d 986, 990 n.5 (1998) (declining to "analyze whether there is any conceptual difference in the standards" for qualified immunity and Fourth Amendment reasonableness).

[9] The court of appeals in this case erroneously suggested (App., *infra*, 11a) that the Second, Fourth, and Seventh Circuits equate the qualified immunity and Fourth Amendment merits inquiries in excessive force cases. The Second Circuit expressly reached the opposite conclusion in *Finnegan*, 915 F.2d at 822-824, and reaffirmed that conclusion again in *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994), cert. denied, 513 U.S. 1076 (1995). Although the court of appeals in this case cited *Thomas* v. *Roach*, 165 F.3d 137 (2d Cir. 1999), for the contrary position, App., *infra*, 11a, *Thomas* does not pass on the issue. The Fourth Circuit has also rejected the claim that the inquiries are identical, *Slattery*, 939 F.2d at 215, and nothing in *Rowland* v. *Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (cited App., *infra*, 11a) states otherwise. Nor does the Seventh Circuit necessarily equate the two inquiries. *Frazell* v. *Flanigan*, 102 F.3d 877, 886-887 (7th Cir. 1996) (cited App., *infra*, 11a), comments favorably on equating them in the "somewhat unique" context of that case, but there is contrary Seventh Circuit authority as well. For example, *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993), specifically declines to equate the inquiries, declaring

noted by the courts of appeals,[10] is sufficiently well developed that, just last Term, this Court granted certiorari to resolve it. See *Snyder* v. *Trepagnier*, 525 U.S. 1098 (1999) (No. 98-507). Because the parties settled *Snyder* just before argument, however, the petition was dismissed, 526 U.S. 1083 (1999), and the conflict remains unresolved.

b. The court of appeals' decision in this case, moreover, is inconsistent with this Court's decision in *Anderson* v. *Creighton*, *supra*. The Ninth Circuit and the other courts of appeals that equate the qualified immunity inquiry with the reasonableness test of the Fourth Amendment rely on the fact that both inquiries

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that "the doctrine of qualified immunity still serves an important purpose in cases of alleged excessive force." Nor has the First Circuit equated the two inquiries. The language from *Roy* v. *Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994), quoted App., *infra*, 11a, refers to the fact that, in that case, the result would not have changed "even if the qualified immunity defense had not been raised." 42 F.3d at 695. *Roy* itself, however, acknowledges that "substantive liability and qualified immunity are two separate questions," *ibid.*, and the First Circuit has (since deciding *Roy*) encountered at least one excessive force case in which, even if a Fourth Amendment violation occurred, immunity was nonetheless appropriate. *Napier*, 187 F.3d at 188.

[10] See, *e.g.*, *Snyder* v. *Trepagnier*, 142 F.3d 791, 801 n.10 (5th Cir. 1998) ("Some other circuits disagree and take the position that a finding of excessive force precludes a finding of qualified immunity."); *Slattery*, 939 F.2d at 215-216 (noting conflict); App., *infra*, 11a (citing *Snyder* as contrary authority). The issue has also generated intracircuit conflicts. The Ninth Circuit has characterized the decision below as "*resolving an apparent intracircuit conflict* between excessive force cases that equated the inquiry on the merits with the qualified immunity analysis and other cases that suggested the two lines of inquiry are distinct." *Headwaters Forest Defense* v. *County of Humboldt*, No. 98-17250, 2000 WL 531004, at *18 (May 4, 2000) (emphasis added). See also note 9, *supra* (noting Seventh Circuit cases).

are framed in terms of "objective reasonableness." In essence, those courts reason that it is not possible for the force to be objectively reasonable for purposes of the qualified immunity inquiry, while also being objectively unreasonable for purposes of the Fourth Amendment itself. See, *e.g.*, App., *infra*, 10a (finding "parity" because both the immunity defense "and the merits of an excessive force claim focus on the objective reasonableness of the officer's conduct"); *Parham*, 929 F.2d at 540, 541 n.2 (if "the force used was unnecessary" and violated the Fourth Amendment, "any question of objective reasonableness" for qualified immunity purposes "has also been foreclosed" because "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law").

This Court, however, rejected virtually indistinguishable reasoning in *Anderson*. In that case too, the plaintiffs argued that the test for qualified immunity merely duplicates the Fourth Amendment merits inquiry because both require reasonableness; it "is not possible," they argued, "to say that one 'reasonably' acted unreasonably." 483 U.S. at 643. This Court rejected that argument as "unpersuasive," *ibid.*, because it relies on the coincidence of language—the common use of the word "reasonable"—in the qualified immunity test and in the Fourth Amendment. If the Fourth Amendment had been written to speak of "undue" searches and seizures, the Court explained, the fallacy of the argument would be apparent, even though the meaning of the Amendment would be unchanged:

> [The argument's] surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and

> seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable * * *. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable [although ultimately mistaken] should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 643-644. The same analysis forecloses the Ninth Circuit's reasoning here. See *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994) (*Anderson* "authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity"), cert. denied, 513 U.S. 1076 (1995); *Karnes* v. *Skrutski*, 62 F.3d 485, 491-492 n.3 (3d Cir. 1995) (the attempt to equate the two inquiries "misconstrues the nature of qualified immunity, and in any case has been rejected by the Supreme Court").[11]

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[11] This Court's decision in *Graham* also suggests that qualified immunity should be available in excessive force cases. In that case, the Court observed that "the officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983." 490 U.S. at 399 n.12 (citing *Anderson*). The

The Ninth Circuit's contrary approach overlooks the fact that "objective reasonableness" serves distinct functions in the Fourth Amendment and qualified immunity inquiries. When a jury or a court determines whether constitutionally excessive force has been used in violation of the Fourth Amendment, it articulates a standard to govern the conduct of an officer confronting a certain set of facts, *i.e.*, it decides whether the officer's conduct was "objectively reasonable." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). But when a decisionmaker resolves the question of immunity, it asks a different question—whether that standard of conduct was sufficiently *obvious* in the first instance that it would be unreasonable to have reached the opposite conclusion. Although both inquiries use the term "reasonable" (or its converse, "unreasonable"), they employ that term for different purposes and in different senses. With respect to the Fourth Amendment itself, reasonableness defines the boundaries of lawful conduct. In the immunity context, it defines the often wider boundaries of what an officer, because of a lack of clarity in the legal standard *or* its application to the specific facts of the case, could *understandably have believed* to be lawful.

Thus, the determination that an officer's use of force was "unreasonable" for Fourth Amendment purposes does not preclude a determination that the question was sufficiently close that reasonable officers (or reasonable judges or jurors) could have disagreed about

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Court also stated that, "[s]ince no claim of qualified immunity has been raised in this case, * * * we express no view on its *proper application* in excessive force cases." *Ibid.* (emphasis added). That sentence on its face reserves the question *how* qualified immunity applies in excessive force cases, and not—as the court of appeals mistakenly believed, App., *infra*, 14a n.4—*whether* it applies.

that conclusion in advance. As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" that only a plainly incompetent officer could have thought otherwise. *Finnegan*, 915 F.2d at 823-824. In other words, a Fourth Amendment violation occurs when, even taking into account the deference owed to the split-second decisions of officers, the conduct turns out to have been, on balance, objectively unreasonable. But immunity is nonetheless appropriate unless that conduct "was so far beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless "application of the [excessive force] standard would inevitably lead every reasonable officer in [the defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).[12]

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[12] Although findings of excessive force and qualified immunity are not necessarily inconsistent, they are not necessarily consistent either. In some cases, there will be no set of facts supported by the evidence under which the officer's conduct could both be unconstitutional and sufficiently close to an unclear constitutional boundary to warrant immunity. That frequently may be true in cases involving the use of deadly force, since those cases are often governed by a bright-line rule and liability often turns on historical facts, such as whether the plaintiff was (or the officer reasonably thought the plaintiff was) armed and dangerous. See *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). Even in deadly force cases, however, the results of the excessive force inquiry and the qualified immunity test can diverge, not only because open legal questions under *Garner* remain, but also because *Garner*'s application to the par-

Attempting to reconcile its decision with this Court's decision in *Anderson*, the Ninth Circuit pointed out that, under its precedents, qualified immunity is examined in two steps: first by asking whether the "law"—by which the Ninth Circuit means the governing factors, legal formula, or standard—"was clearly established";[13] second by examining whether a reasonable officer could have believed his conduct to be lawful under that standard. App., *infra*, 8a. This "Court's qualified immunity discussion in *Anderson*," the court of appeals stated, "focuses on the proper formulation of the 'clearly established'" step, or "the first prong" of that analysis, and does not "address the application of the second prong of the qualified immunity analysis," which is whether a reasonable officer could have believed his conduct to be lawful. *Id.* at 13a-14a n.4. That distinction is unpersuasive for two reasons.

First, *Anderson* does not contemplate dividing the qualified immunity inquiry into two distinct "prongs," one involving whether there was "clearly established" law, and the other involving whether a reasonable officer could have believed his conduct to be lawful. Instead, *Anderson* makes it clear that the Ninth Circuit's second prong (whether a reasonable officer could have thought the conduct lawful) is how courts should decide the first (whether the law is "clearly established"). As this Court explained in *Anderson* itself,

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ticular facts confronting an officer does not always yield an undebatably certain result.

[13] See *Headwaters Forest Defense*, No. 98-17250, 2000 WL 531004, at *18 (declaring that "the law concerning the use of excessive force is clearly established" even though its application in the particular factual context was "unprecedented," because "the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment" are well established).

the law is "clearly established" for purposes of qualified immunity only if "[t]he contours of the right" are "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." 483 U.S. at 640 (emphasis added); *Wilson* v. *Layne*, 526 U.S. 603, 614-615 (1999) ("'Clearly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"). If reasonable officers could have disagreed on whether the conduct was lawful, the law was *not* "clearly established" and immunity must be recognized; in contrast, if reasonable officers could not have disagreed, the law was clear. *Malley*, 475 U.S. at 341. *Anderson* thus cannot be distinguished as relating to "prong one" instead of "prong two" of the Ninth Circuit's two-prong qualified immunity test because, under *Anderson*, the Ninth Circuit's two "prongs" are different ways of asking a single question.

Second, the court of appeals erred in asserting (App., *infra*, 13a-14a n.4) that *Anderson* addresses the Ninth Circuit's first prong (whether the governing standard was clearly established) rather than the second (whether an officer could have thought his conduct lawful). In fact, in *Anderson* there was no dispute about the "first prong" because the standard governing the officer's conduct—there, a warrantless search—was not in dispute.[14] The only question in *Anderson* was whether

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[14] *Anderson* concerned officers who allegedly searched a home for a fugitive, without a warrant, in the absence of probable cause and exigent circumstances. The legal standards and verbal formulae governing such conduct were well settled before the incident that gave rise to that case. *Anderson*, 483 U.S. at 640; *Johnson* v. *United States*, 333 U.S. 10 (1948); *Steagald* v. *United States*, 451 U.S. 204 (1981); *Payton* v. *New York*, 445 U.S. 573, 578 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963).

qualified immunity protected officers who might have erred in applying the established standard, *i.e.*, in determining that probable cause and exigent circumstances were present on the facts before them. See 483 U.S. at 640-641 (court of appeals erred by refusing to consider, on qualified immunity, "the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances"). See also *Hunter*, 502 U.S. at 228 (officers entitled to immunity "if a reasonable officer could have believed" probable cause existed). Thus, in *Anderson* itself, this Court held that the relevant question for qualified immunity is "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 483 U.S. at 641. That *is* what the Ninth Circuit considers to be the second prong, expressed in nearly identical language. See App., *infra*, 8a (under second prong, court asks whether "a reasonable official could have believed the conduct was lawful").[15]

c. Equating the qualified immunity inquiry with the Fourth Amendment reasonableness standard in excessive force cases, moreover, fundamentally undermines a critical function served by qualified immunity. Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Consequently, this Court "repeatedly

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[15] The Ninth Circuit also distinguished *Anderson* as a case about warrantless searches rather than excessive force, App., *infra*, 14a n.4, but the Ninth Circuit offered no reason for treating the two Fourth Amendment claims differently. See *Slattery*, 939 F.2d at 215 (finding "no principled reason" for distinguishing qualified immunity in excessive force cases from qualified immunity in other Fourth Amendment cases); *Brown*, 878 F.2d at 873 (similar).

ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation," so that officers do not "err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 227, 229 (internal quotation marks omitted).

Equating qualified immunity with Fourth Amendment reasonableness is inconsistent with that requirement. In the Ninth Circuit (and elsewhere in practice), "[t]he question of the reasonableness of force" under the Fourth Amendment "is usually" treated as "a question of fact for the jury," and therefore generally must be resolved at trial. App., *infra*, 14a n.5; *Roy* v. *Inhabitants of City of Lewiston*, 42 F.3d 691, 694-695 (1st Cir. 1994) ("Judgments about reasonableness are usually made by juries in arguable cases, even if there is no dispute about what happened."). By equating qualified immunity with substantive Fourth Amendment reasonableness, the Ninth Circuit effectively requires the question of qualified immunity in excessive force cases generally to be resolved at trial as well. Indeed, under the Ninth Circuit's approach, summary judgment on qualified immunity must be denied unless "the evidence *compels* the conclusion that [the officer's] use of force was reasonable." App. *infra*, 15a n.5 (emphasis added). That standard, however, is virtually indistinguishable from the one this Court rejected in *Hunter* v. *Bryant*, precisely because "it routinely places the question of immunity in the hands of the jury." 502 U.S. at 228.[16]

The Ninth Circuit's approach, moreover, turns the qualified immunity inquiry on its head. Summary judg-

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[16] In *Hunter*, the Ninth Circuit stated that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment * * * based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 502 U.S. at 228.

ment should not be *limited* to cases where the force was so clearly reasonable as to "compel[]" the conclusion that it was lawful. App., *infra*, 15a n.5. Quite the opposite: Summary judgment on qualified immunity is *required* unless (viewing the facts in the light most favorable to the plaintiff) the standards and relevant cases "truly compel (not just suggest or allow or raise a question about), the conclusion * * * that what defendant [did] violates federal law in the circumstances." *Priester*, 208 F.3d at 927. Thus, qualified immunity serves an "important purpose" at summary judgment in excessive force cases, because it permits the entry of judgment not only where no one could think the force unreasonable, but also where "reasonable minds could differ." *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993).

2. This case, moreover, illustrates the importance of distinguishing the Fourth Amendment merits question from the qualified immunity inquiry in unreasonable force cases. As the district court noted, petitioner asserts qualified immunity for (1) the "degree of force used to remove [respondent] from the crowd," and (2) the force used to "place [respondent] inside the van." App., *infra*, 29a. See also *id.* at 27a (analyzing the two uses of force). Whatever one might think of the constitutionality of those uses of force, neither was so clearly unreasonable that no officer could have thought it to be lawful at the time.

a. As to the first use of force, petitioner and Sergeant Parker removed respondent from the crowd by each taking one of his arms, lifting him, and rushing him out to the police van. See pp. 3-4, *supra*; App., *infra*, 4a, 24a-25a; *id.* at 27a (describing videotape). The Ninth Circuit denied qualified immunity for that conduct, concluding that "no reasonable officer could have believed that" grabbing hold of respondent "without warning or

speaking to him" and partially carrying him from the crowd "was necessary under the circumstances," *id.* at 15a, because respondent's crime was not serious and respondent did not pose an immediate threat to public safety.[17] The court stated:

> Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was

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[17] The Ninth Circuit's use of the phrase "no reasonable officer" echoes a component of the qualified immunity standard required by *Anderson* v. *Creighton*. That does not mean, however, that the Ninth Circuit articulated and applied the correct standard under *Anderson*. To the contrary, the Ninth Circuit held that the relevant immunity standard could not be met (and summary judgment was improper) unless "the amount of force [petitioner] used in arresting [respondent] was *so minimal* that it was *per se* reasonable." App., *infra*, 14a (emphasis added). That latter articulation is clearly at odds with any notion of resolving close questions in favor of the officer, as qualified immunity ordinarily requires. See *Hunter*, 502 U.S. at 235 (Kennedy, J., concurring) (given that doubt "has been expressed" on "whether the Court of Appeals applied the correct legal standard to resolve the qualified immunity issue on summary judgment," it would be appropriate to "set the case for full briefing and oral argument."). Indeed, the court of appeals held that even close cases must be resolved at trial because the "reasonableness of force"—a question the court of appeals equated with the qualified immunity inquiry—"is usually a question of fact for the jury," and can be resolved on summary judgment only when "the evidence *compels the conclusion* that [the officer's] use of force was reasonable." App., *infra*, 14a-15a n.5 (emphasis added). As explained above, that approach turns the inquiry upside down; it is precisely where reasonable minds could differ on the force's reasonableness that immunity is appropriate. See pp. 23-24, *supra*. Second, the court of appeals improperly focuses on the issue of "necess[ity]." App., *infra*, 10a, 11a, 15a. The question for qualified immunity purposes, however, is whether an officer could reasonably have thought the amount of force employed to be *reasonable* and thus lawful. Cf. *Seekamp* v. *Michaud*, 109 F.3d 802, 807-808 (1st Cir. 1997) (officer not required to use the least intrusive degree of force possible).

> sixty years old and wearing a leg brace. There is no indication he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else.

Ibid.

By holding that the use of such minimal force is not only unreasonable, but *so obviously* unreasonable that no officer could have thought it lawful, the Ninth Circuit has effectively held that, in cases like this, officers are prohibited from using *any force at all* to make an arrest. That suggestion is difficult to reconcile with this Court's decision in *Graham*, which recognizes "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396. It conflicts with cases from other circuits.[18] And it conflicts with common sense. The officers were

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[18] See, *e.g.*, *Curd* v. *City Court*, 141 F.3d 839, 841 (8th Cir.) (where officer "seized [arrestee's] arm, spun her around and told her to get into the police car," the "limited amount of force" was not "objectively unreasonable" under *Graham*, "[e]ven if * * * unnecessary to effect the arrest," especially given that the plaintiff "does not allege, and there is no evidence, that she was injured or experienced physical pain"), cert. denied, 525 U.S. 888 (1998); *Hinton* v. *City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993) (similar). Indeed, the Eleventh Circuit has, in a long line of cases, repeatedly applied the "de minimis" label to uses of force that exceed the amount used in this case. *Nolin* v. *Isbell*, 207 F.3d 1253, 1255-1258 (2000) (summarizing). See, *e.g.*, *Jones* v. *City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997) (immunity proper where officer "slammed" the plaintiff against a wall and "kicked his legs apart," causing him to suffer pain). We do not preclude the possibility that, in some circumstances, the only reasonable amount of force is no force at all. As explained in text, however, the minimal force used in this case was not so obviously unreasonable that no officer could have thought it lawful.

confronted with the possibility of escalation (other potential protestors were in the crowd) and charged with ensuring the safety of the Vice President, who stood only steps away. According to the court of appeals, the officers' use of surprise to their advantage in those circumstances—by seizing respondent (who was openly flouting the bar on banners) quickly and whisking him away—was unreasonable; instead, the court of appeals suggested, the officers should have "warn[ed] or sp[oken] to" respondent first. App., *infra*, 15a. We know of no decision of this Court holding that the police, confronted with a suspect who openly defies the law, must discuss the possibility of seizure with him in advance and thus may not use surprise to take him into custody quickly. Even if the Fourth Amendment were construed as containing such a requirement, petitioner surely was not "plainly incompetent" not to have known that at the time. *Malley*, 475 U.S. at 341.

b. With respect to the force used to place respondent in the van, the court of appeals suggested that, because respondent denies resisting, it may not have been necessary to push respondent inside. App., *infra*, 15a. But "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson* v. *Glick*, 481 F.2d [1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)], violates the Fourth Amendment." *Graham*, 490 U.S. at 396. *A fortiori*, a single push, later deemed unnecessary, cannot be so *clearly unconstitutional* as to defeat qualified immunity.

Nor does it matter that respondent, in his complaint and his court of appeals brief, claimed that he was shoved "violently." See App., *infra*, 15a. As an initial matter, the shove to which respondent refers did *not*

come from petitioner—it came from Sergeant Parker[19] —and the Ninth Circuit nowhere articulated any basis for holding petitioner liable for Parker's conduct. Besides, merely quoting the adverb "violently" from the complaint cannot substitute for reasoned analysis of whether the admissible evidence shows force that was so clearly excessive as to render qualified immunity inappropriate. See Fed. R. Civ. P. 56(e) (party may not "rest upon the mere allegations" of a pleading to defeat a properly supported motion for summary judgment).[20] Here, after reviewing a videotape of the actual events in question, the district court declared that, when viewed "in a light most favorable to" respondent, the tape showed the officers "removing" respondent from the crowd, "carrying or pulling him" toward the van, and "push[ing]" or "placing" him inside. App., *infra*, 27a. The videotape itself—which is being lodged with this Court—not only confirms that analysis, but dispels the notion that the force petitioner used was so excessive as to be clearly and obviously unlawful.

c. The court of appeals, moreover, fundamentally erred by employing hindsight to second-guess the per-

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[19] The videotape makes that clear. As respondent is placed into the van, Sergeant Parker appears on the right side of the screen; petitioner appears on the left, wearing glasses. See Saucier Dep. 24; Parker Dep. 58.

[20] The characterization of the push as "violent[]," even if accepted, does not itself establish that qualified immunity should have been denied. Black's defines "violently" as "[b]y the use of force; forcibly," *Black's Law Dictionary* 1570 (6th ed. 1990), and "violent" as "characterized" by "physical force, especially by extreme and sudden or by unjust or improper force." *Ibid.* Consequently, the inclusion of the word "violently" in the complaint merely underscores the fact that the push involved force, and potentially "unjust and improper" force. It does not demonstrate that the force used was so extreme and unjustified that no reasonable officer could have thought it lawful.

ceptions and actions of the officers on the scene. Fourth Amendment and qualified immunity issues, this Court has admonished, must be examined from "the perspective of a reasonable officer on the scene," 490 U.S. at 396, and should not be reconstructed in view of the more expansive knowledge that extensive litigation and leisurely examination can produce years later. See *Hunter*, 502 U.S. at 228 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact").

In this case, the court of appeals repeatedly ignored those admonitions. First, without acknowledging the atmosphere of uncertainty confronting the officers, the court of appeals faulted their treatment of respondent because, "at this stage of the case," it "appears" that respondent posed no "immediate threat." App., *infra*, 15a. See also *ibid.* (relying on the fact that "[t]here *is* no indication" that respondent was armed or dangerous) (emphasis added). The relevant question, however, is not what "appears" now, after years of litigation; the question instead is what the police knew at the time. *Hunter*, 502 U.S. at 228. Thus, the court of appeals also erroneously attributed significance to the fact that respondent was wearing a leg brace, App., *infra*, 15a, 27a, when there was no evidence that either officer was aware of the brace, and respondent testified that the brace was *underneath* the leg of his trousers. Resp. Dep. 34; Parker Dep. 47; Saucier Dep. 17.

Similarly, the court of appeals mistakenly thought summary judgment was defeated by respondent's claim that he did not resist being placed in the van, App., *infra*, 15a, when the relevant inquiry is whether—accepting respondent's assertion that he did not resist—the officers reasonably could have *believed* that re-

spondent was resisting. It is undisputed that respondent took actions that could have created the appearance of resistance: petitioner testified that respondent resisted by putting his feet on the van's bumper and pushing away, *id.* at 25a, while respondent testified that he put his feet on the van's entry or the bumper as the officers attempted to place him inside, Resp. Dep. 40-41.

The court of appeals thus engaged in—and invited—precisely the sort of omniscient hindsight analysis that qualified immunity and the Fourth Amendment both forbid. By denying qualified immunity, the court in effect established a rule that law enforcement officers making an arrest may use no more force than absolutely necessary and, in many cases, may use no force at all. That rule is unsupported by precedent, and in any event is not so clearly established as to defeat qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16298

ELLIOT M. KATZ; IN DEFENSE OF ANIMALS
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA; CORBIN LEE, MAJOR;
BRIAN O'NEILL; STEVEN PARKER, SERGEANT;
GLYNN C. MALLORY, JR., GENERAL, DEFENDANTS
AND
DONALD SAUCIER, PRIVATE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of California

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[Filed: Oct. 22, 1999]

Before: THOMPSON and GRABER, Circuit Judges, and CARROLL, District Judge.[1]

DAVID R. THOMPSON, Circuit Judge:

Army Private Donald Saucier ("Saucier"), acting as a military police officer, arrested Elliot M. Katz ("Katz")

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[1] The Honorable Earl H. Carroll, United States Senior District Judge for the District of Arizona, sitting by designation.

during a public event at the San Francisco Presidio. Katz was holding up a sign when he was arrested. According to Katz, Saucier and another officer grabbed him, tore the sign out of his hands, dragged him fifty feet, and violently tossed him into a van. Katz brought a *Bivens* action against Saucier and others for violations of his constitutional rights. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). Saucier filed a motion for summary judgment, contending he was entitled to qualified immunity. The district court denied Saucier's motion as to Katz's Fourth Amendment claim, which was grounded on Saucier's alleged use of excessive force in effecting Katz's arrest. Saucier appeals.

Saucier contends that, although our circuit has a long line of cases in which we have held that the reasonableness inquiry on the merits of a Fourth Amendment excessive force claim is the same as the reasonableness inquiry posed by a qualified immunity defense, these cases conflict with our en banc holding in *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir. 1991). We disagree, and affirm the district court.

FACTUAL BACKGROUND[2]

This case arises out of Katz's arrest for his conduct during a speech given by Vice President Gore at the Presidio Army base in San Francisco. Katz, an animal rights activist, seeks damages from Saucier for violating his Fourth Amendment rights by using excessive

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[2] Consistent with the standard of review on summary judgment, the facts are presented in the light most favorable to Katz. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

force. This claim is one of multiple claims brought by Katz and In Defense of Animals ("IDA"), an animal rights organization of which Katz is president, against the United States, a national parks official, and various military officials.

On September 24, 1994, the public was invited to attend a special presentation by Vice President Gore, followed by other speakers, on the main post at the Presidio. The event was to celebrate the anticipated conversion of most of the Presidio to a national park. The conversion of the Presidio was a subject of public controversy, with animal rights activists concerned about the possibility of animal experimentation at the Army's Letterman Hospital.

Katz, a veterinarian who was then sixty years old, and other members of IDA were among the several hundred members of the public who attended the event. Katz arrived early and sat at the front of the public seating area, which was separated from the stage and dignitary seating area by a waist-high cyclone fence. He was wearing a visible, knee-high leg brace because of a broken foot. He was not wearing a shoe on his injured foot.

On the day of the event, Saucier was working as a military police officer. In his deposition, Saucier testified that he had been told by his superiors that demonstrations would not be allowed. He had been instructed to "diffuse the situation if it arises," but not to "draw that much attention if we didn't have to." Saucier admits that Katz was "pointed out as one of the potential, you know, activists" and that he knew "who this person was . . . the person we need[ed] to keep an eye on."

Either before or as Vice President Gore began speaking, Katz silently removed a cloth banner from his jacket. As Gore was speaking, Katz started to unfold the banner and walked to the barrier. The banner measured approximately four feet by three feet and stated "Please Keep Animal Torture Out of Our National Parks." Katz intended to hang the banner over the fence so that Vice President Gore and the other speakers could read it.

According to Katz's deposition, before he could fully unfurl the banner, a military police officer "grabbed [him] from behind and somebody else tore the banner away." These individuals were Defendants Saucier and Steven Parker, an Army sergeant. Katz did not try to prevent them from taking the banner. The two military police officers then each took one of Katz's arms and "started sort of picking [Katz] up and kind of walking [him] out, kind of like very hurriedly, sort of like the bum's rush." They took Katz to a military van parked behind the seating area and "violently threw" him inside. As the military police officers "shoved" Katz into the vehicle, he was able "to kind of prevent" his head from smashing into the floor of the van. He "was able to stop the downward and the forward motion by just catching [himself] so that [he] didn't smash [himself]." With "a great deal of effort," he was barely able "to prevent [himself] from getting seriously hurt."

The military police officers never spoke to Katz. They closed the door to the van, leaving Katz alone in the vehicle for about twenty minutes. At some point, the military police officers placed another IDA member in the van, and they searched and handcuffed Katz and the other IDA member. They then drove Katz and the

other IDA member to a military police station. After being briefly detained, Katz was released and allowed to drive home. Katz was never informed of the basis for his detention or cited with any violation of any law or regulation.

PROCEDURAL HISTORY

Katz and IDA filed a lawsuit in the district court alleging multiple claims against the United States, a national parks official, and various military officials. Against Saucier, Katz alleged claims predicated upon violations of the First Amendment, by depriving Katz of his right to free speech, and the Fourth Amendment, by arresting Katz without probable cause and with excessive force. Katz asserted the same claims against Sergeant Parker, but at the time of this appeal Parker had not been served.

As to Katz's First Amendment-based claim, the district court granted summary judgment in favor Saucier and several of the military officials on the ground of qualified immunity. The district court determined that, "[i]n light of the transitional stage of the Presidio on September 24, 1994, . . . the [c]onstitutional rights of protestors at the base were not well settled on that date. [Thus], a reasonable military officer could have concluded that preventing protests at the base was [c]onstitutional." The district court also granted summary judgment in favor of Saucier on Katz's false arrest claim, holding that Saucier was entitled to qualified immunity. The district court, however, denied Saucier's motion for summary judgment on Katz's excessive force claim.

The district court described in detail the factual disputes between the parties concerning the amount of force used, the nature of the risk posed by Katz, and whether and to what degree Katz resisted arrest. The district court concluded that "[a] triable issue of fact exists as to whether [the] defendants employed excessive force in removing Katz from the crowd and placing him in the police van." On the issue of qualified immunity, the district court held that the law governing the use of force in an arrest was clearly established. Stating that "the qualified immunity inquiry is the same as the inquiry on the merits" in an excessive force claim, the district court concluded that "a question of fact [exists] regarding whether a reasonable officer could believe [Saucier's] use of force was lawful."[3]

Saucier timely filed this interlocutory appeal of the district court's order denying him qualified immunity.

DISCUSSION

I.

STANDARD OF REVIEW

We review de novo a denial of summary judgment on qualified immunity. *See Knox v. Southwest Airlines*, 124 F.3d 1103, 1105 (9th Cir. 1997).

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[3] Because of the lack of a link between the actions of Defendants General Glynn Mallory, Jr., and Major Corbin Lee and Saucier's use of force, the district court granted summary judgment in favor of those defendants on Katz's Fourth Amendment-based claims.

II.

JURISDICTION

We have jurisdiction under the collateral order doctrine to review an interlocutory appeal of the district court's order denying summary judgment on a qualified immunity defense. *See Armendariz v. Penman*, 75 F.3d 1311, 1316 (9th Cir. 1996) (*citing Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985)). The collateral order doctrine, however, "does not sanction review of a district court's order denying the defendant's motion for summary judgment on qualified immunity grounds when the basis for the defendant's motion is that the evidence in the pretrial record is insufficient to create a genuine issue of fact for trial." *Id.* at 1317 (citing *Johnson v. Jones*, 515 U.S. 304, 313-319, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995)). Thus, on summary judgment, our review is generally "limited to determining whether clearly established law existed at the time of the incident that [the defendant's] actions could have violated." *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998). We also have jurisdiction, however, to review the question whether there is any genuine issue of material fact as to whether an officer's conduct "met the [qualified immunity] standard of 'objective legal reasonableness.'" *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S. Ct. 834, 133 L.Ed.2d 773 (1996); *see also Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996) ("An appellate court [also] has jurisdiction to consider defendants' assertion that the dispute of fact is not *material*.").

III.

Qualified Immunity Analysis In An Excessive Force Case

Saucier argues that our en banc holding in *Hammer*, 932 F.2d at 850, conflicts with our later cases in which we have equated the reasonableness test for the defense of qualified immunity with the reasonableness test for the merits of an excessive force claim. We disagree.

"The doctrine of qualified immunity protects 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Somers v. Thurman*, 109 F.3d 614, 616-17 (9th Cir.) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)), *cert. denied*, 522 U.S. 852, 118 S. Ct. 143, 139 L.Ed.2d 90 (1997). The qualified immunity analysis is the same for *Bivens* actions against federal officials as it is for claims against state officials under 42 U.S.C. § 1983. *See Harlow*, 457 U.S. at 818 n. 30, 102 S. Ct. 2727. "To determine whether an official is entitled to qualified immunity, we conduct a two-part analysis: (1) We consider whether the law governing the official's conduct was clearly established. If it was not clearly established, the official is entitled to immunity from suit. (2) If the law was clearly established, we proceed to ask if under that law, a reasonable official could have believed the conduct was lawful." *Somers*, 109 F.3d at 617 (citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993)).

Qualified immunity is a defense. In a civil rights action in which qualified immunity is asserted, the reasonableness of an officer's conduct comes into play under the second prong of that defense. In a civil rights action founded on the use of excessive force under the Fourth Amendment, the reasonableness of the officer's conduct also comes into play, not as an element of the officer's defense, but as an element of the plaintiff's case. The Supreme Court held in *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989), that "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." The Court explained that this "'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the [officer's] actions are 'objectively reasonable' in light of the facts and circumstances confronting [him]." *Id.* at 397, 109 S. Ct. 1865.

The essence of the *Graham* reasonableness inquiry is a balancing of the "force which was applied . . . against the *need* for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997) (internal quotation marks and citations omitted). In evaluating whether the force used to effect a particular arrest is reasonable, a court must pay careful attention to the following non-exhaustive list of factors: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape." *Id.* (citing *Graham*, 490 U.S. at 396, 109 S. Ct. 1865).

Both the second prong of the qualified immunity defense (whether a reasonable officer could have believed his conduct was lawful), and the merits of an excessive force claim focus on the objective reasonableness of the officer's conduct. To determine whether an officer is entitled to the defense of qualified immunity when the use of force is in issue, the question asked is whether a hypothetical officer reasonably could have believed that the amount of force used was reasonable. To resolve the merits of an excessive force claim, the question is whether a reasonable officer could have believed that the force used was necessary under the circumstances. *See Graham*, 490 U.S. at 397, 109 S. Ct. 1865. Because of this parity, we have repeatedly held that "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995); *accord Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1147-48 (9th Cir.), *cert. denied*, 519 U.S. 1009, 117 S. Ct. 514, 136 L.Ed.2d 403 (1996); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S. Ct. 2612, 132 L.Ed.2d 855 (1995); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995); *Palmer v. Sanderson*, 9 F.3d 1433, 1435-36 (9th Cir. 1993); *Morgan v. Woessner*, 997 F.2d 1244, 1259-60 (9th Cir.), *cert. dismissed*, 510 U.S. 1033, 114 S. Ct. 671, 126 L.Ed.2d 640 (1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 n. 3 (9th Cir. 1992); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991), *cert. denied*, 506 U.S. 972, 113 S. Ct. 460, 121 L.Ed.2d 369 (1992).

The majority of other circuits have taken similar positions. *See Bass v. Robinson*, 167 F.3d 1041, 1051 (6th Cir. 1999); *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999); *Frazell v. Flanigan*, 102 F.3d 877, 886-87 (7th Cir. 1996); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231, 117 S. Ct. 1824, 137 L.Ed.2d 1031 (1997); *Mick v. Brewer*, 76 F.3d 1127, 1135 n. 5 (10th Cir. 1996); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994); *cf. Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test of liability and the Court's own standard for qualified immunity." (citations omitted)). *But see, Snyder v. Trepagnier*, 142 F.3d 791, 800-01 (5th Cir. 1998) ("There is no inherent conflict between a finding of excessive force and a finding of qualified immunity."), *cert. granted*, —— U.S. ——, 119 S. Ct. 863, 142 L.Ed.2d 716 (including "[w]hether a jury finding that a constitutional violation incurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable"), *cert. dimissed*, —— U.S. ——, 119 S. Ct. 1493, 143 L.Ed.2d 575 (1999) (pursuant to agreement between the parties).

As the district court recognized, in an excessive force case, a material issue of fact as to whether an officer used excessive force precludes summary judgment on a qualified immunity defense. An officer cannot have an objectively reasonable belief that the force used was necessary (entitling the officer to qualified immunity) when no reasonable officer could have believed that the force used was necessary (establishing a Fourth

Amendment violation). *See Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991). If genuine issues of material fact as to the amount of force used, or the circumstances that might justify the amount of force used, prevent a court from concluding as a matter of law that the force was objectively reasonable, then a material issue of fact necessarily exists as to whether an objectively reasonable officer could have believed the amount of force used was lawful.

We reject Saucier's assertion that our many and consistent panel opinions on this subject are in conflict with our en banc opinion in *Hammer*, 932 F.2d at 850. In *Hammer*, the plaintiff alleged that an arresting officer had used excessive force to obtain a blood sample from him after his arrest for drunken driving. *See id.* at 843-44. At the time of the arrest, prevailing Supreme Court authority expressly permitted the withdrawal of blood over the objection of the subject. *See id.* at 850 (citing *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966) and *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed.2d 448 (1957)). The constitutionality of the use of force to extract blood was judged by the "shock the conscience" standard, which standard the plaintiff Hammer conceded was not met. *See id.* We held that, although "*Graham* imposes a balancing test that can . . . result in force being found excessive even though it did not rise to the level that shocks the conscience[, r]easonable officers . . . cannot be required to have anticipated the ruling in *Graham*." *Id.* Thus, we concluded that the defendants were "immune from personal liability in damages for their actions in applying or authorizing the use of force that was unreasonable in all the circumstances but well below the level

that shocks the conscience." *Id.* It was in this context that we stated:

> [The plaintiff] suggested at oral argument that an officer who has used unreasonable force cannot, by definition, have acted reasonably. A similar contention was rejected, however, in [*Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987)]. Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer could have believed his actions lawful under the Fourth Amendment. [*See id.*] at 643-44, 107 S. Ct. 3034. To accept [the plaintiff's] contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome. *See id.* at 643, 107 S. Ct. 3034.

Id.

Saucier contends this passage contradicts and invalidates our subsequent holdings that the "objective reasonableness" tests for excessive force and qualified immunity are the same. It does not. *Hammer* involved circumstances not at issue here or in the subsequent line of cases Saucier challenges. *Graham* articulated a new objective reasonableness test that was different from what had been the clearly-established "shock-the-conscience" test. The amount of force used in *Hammer* violated the Fourth Amendment because it was objectively unreasonable, but an objectively reasonable officer could have believed that his conduct did not "shock the conscience" and thus was in fact lawful under the legal test used at the time. Such an outcome is specifically contemplated by the qualified immunity test, par-

ticularly the first prong.[4] *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1446-50 (9th Cir. 1994) (affirming qualified immunity because the training and use of police dogs did not contravene clearly established law).

Unlike the situation in *Hammer*, our subsequent line of cases which have equated the merits of the "objective reasonableness" inquiry in a use-of-force case with the "objective reasonableness" inquiry in a qualified immunity defense do not eliminate the availability of qualified immunity as a defense in excessive force cases. A defendant will always be entitled to qualified immunity when the law governing his or her conduct was not clearly established—the first prong of the qualified immunity defense.

As a fallback position, Saucier argues that even if the district court applied the correct legal test to his qualified immunity defense, the amount of force he used in arresting Katz was so minimal that it was *per se*

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[4] Most of the Supreme Court's qualified immunity discussion in *Anderson* focuses on the proper formulation of the "clearly established" prong. *See Anderson*, 483 U.S. at 639-41, 107 S. Ct. 3034; *cf. Harlow*, 457 U.S. at 818-19, 102 S. Ct. 2727 ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."). Although in *Anderson* the Court rejected the argument that qualified immunity is never available in Fourth Amendment cases, the Court did not address the application of the second prong of the qualified immunity analysis, let alone its application in excessive force cases. *See Anderson*, 483 U.S. at 643-44, 107 S. Ct. 3034; *see also Graham*, 490 U.S. at 399 n. 12, 109 S. Ct. 1865 (expressly reserving the question whether qualified immunity is available in excessive force cases).

reasonable.[5] We disagree. The facts are in dispute. According to Katz, without warning or speaking to him, Saucier and Parker approached him from behind, grabbed his banner, dragged him about fifty feet, and tossed him into the back of a van so violently that he narrowly avoided serious injury. Taking these facts as true for the purpose of summary judgment, no reasonable officer could have believed that the alleged amount of force used to arrest Katz was necessary under the circumstances. *See Liston*, 120 F.3d at 976 ("[W]e must pay careful attention to (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape."). Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was sixty years old and wearing a leg brace. There is no indication that he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else. Although Saucier disputes whether Katz resisted arrest, Katz says he did not.

In sum, taking the facts as asserted by Katz in the light most favorable to him, no reasonable officer could have believed that the amount of force used was lawful. *See, e.g., Sheth v. Webster*, 145 F.3d 1231, 1238 (11th Cir. 1998) (officer not entitled to qualified immunity for

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[5] The question of the reasonableness of force is usually a question of fact for the jury. "However, on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Hopkins*, 958 F.2d at 885.

pushing, handcuffing, and dragging plaintiff in absence of justification); *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 353 (1st Cir. 1995) ("[W]e are not persuaded that the record evidence compelled the conclusion that the force with which [the defendant officer] effected the sudden, unannounced, violent seizure and removal of Alexis's person was objectively reasonable . . . ."). Saucier was not entitled to summary judgment as a matter of law.

CONCLUSION

The district court correctly relied on our long line of cases consistently holding that the reasonableness inquiry as to whether a defendant is entitled to the defense of qualified immunity in a claim of excessive force under the Fourth Amendment is the same as the reasonableness inquiry on the merits of such a claim. Genuine issues of material fact are in dispute as to whether Saucier used excessive force in effecting Katz's arrest. The district court did not err in denying Saucier's motion for summary judgment predicated on qualified immunity.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-3466 DLJ

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,
PLAINTIFFS

v.

UNITED STATES, MAJOR CORBIN LEE,
SERGEANT STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR., BRIAN
O'NEILL, AND DOES 1 THROUGH X, INCLUSIVE,
DEFENDANTS

[Filed: May 15, 1998]

ORDER

Now before the Court are defendant Saucier's and defendants Mallory and Lee's motions for summary judgment. Having considered the arguments of counsel, the papers submitted, the applicable law and the record in this case, the Court GRANTS IN PART and DENIES IN PART defendant Saucier's motion and GRANTS defendants Mallory and Lee's motion.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiffs are In Defense of Animals, an animal rights organization, and Elliot Katz, its president. Defendants are Major Corbin Lee, Commanding Officer for the Military Police in the Presidio; Lieutenant General Glynn C. Mallory, Jr., Commanding General of the Sixth United States Army; Sergeant Steven Parker, squad leader on duty September 24, 1994 in the Presidio; and Private First Class Donald Saucier, military police officer on duty September 24, 1994 in the Presidio.

By press release dated September 20, 1994 and other publicity, the National Park Service invited the public to attend base conversion celebration activities at the Presidio on September 24, 1994. *See* Exh. A attached to Plaintiffs' Supplemental Opposition filed Mar. 22, 1998. The objective of the event was to commemorate "the Presidio's historic transfer from military post to national park" on October 1, 1994. *Id.* Government officials, including Vice President Gore, gave speeches. Hundreds of people attended the event.

Plaintiffs claim to have suffered civil rights violations caused by defendants at the base conversion celebration. Plaintiffs filed their original complaint on September 29, 1994, seeking damages, declaratory relief and injunctive relief. They allege that plaintiff Katz was prohibited from displaying a banner expressing sentiments critical of the treatment of animals in medical research to be conducted at the Presidio's Letterman Hospital. They allege that Katz was sitting be-

hind a gate which blocked the public from the stage. They claim that as Vice President Gore began speaking about the Presidio becoming a "global learning center," Katz, without saying anything, removed a cloth banner from his jacket. The banner was approximately 4 feet by 3 feet and stated "Please Keep Animal Torture Out of Our National Parks." They allege that Katz intended to display the banner by hanging it over the fence so that it could be read by Vice President Gore and the other speakers.

Plaintiffs claim that before Katz could display the banner, a Military Police officer grabbed him from behind, ripped the banner out of his hands, forcibly grabbed him, and violently threw him into the police van. They allege that Katz was searched and handcuffed but never informed of the basis for his detention and never cited with violation of any law or regulation. Plaintiffs contend that they never received written notice of any restrictions on expressive activity on the Presidio during the September 24, 1994 event.

The Court has dealt with a number of dispositive motions in this case. Most recently, and relevant to the instant motion, the Court granted summary judgment in favor of defendants Mallory and Lee on plaintiffs' First Amendment claim. The Court found that defendants Mallory and Lee were entitled to qualified immunity because plaintiffs' First Amendment rights were not well-settled at the time of the base conversion celebration. The Court deferred ruling on defendants' motion for summary judgment with regard to the Fourth Amendment claim. Mallory and Lee's motion for summary judgment on the Fourth Amendment claim is now before the Court.

On October 3, 1997, defendant Saucier moved for summary judgment on the Fourth Amendment claim. Plaintiffs filed their opposition on October 22, 1997, and defendant Saucier replied on October 28, 1997. The matter was heard on November 12, 1997, at which time the Court granted the parties leave to file supplemental briefing. The Court took defendant Saucier's motion for summary judgment under submission on February 27, 1998.

B. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. *T.W. Electric*, 809 F.2d at 630 *citing Celotex*, 477 U.S. at 323; *Kaiser Cement*, 793 F.2d at 1103-1104.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49 (2nd Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.*, 626 F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial. The standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one

party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

II. ANALYSIS

Defendants Saucier, Mallory and Lee contend that they are entitled to summary judgment because they did not violate Katz's Fourth Amendment rights.

A. Probable Cause to Arrest

The Fourth Amendment prohibits an officer from making an arrest without probable cause. *Mackinny v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995) (citing *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990)). Probable cause exists when the "facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime." *Id.*

Defendants claim that there was probable cause to arrest Katz. Defendants claim that Military Police personnel had been briefed on the morning of the event and informed that demonstrations would not be allowed. Parker Depo. at 40. They refer to Katz's own statement that during the speeches, he removed the banner from inside his jacket and "stood up, opened the banner up, unfolded the banner, and walked to the barrier." Katz Decl. at 36:5-11. Katz states that he then placed the banner on top of the barrier so as to allow it to "fall down and open up so it would just be hanging from the barrier." *Id.* Defendants argue that they had probable cause to believe that plaintiff was about to engage in an unlawful demonstration when

they observed him unfurl the banner and approach the barricade.

Plaintiffs argue that defendants lacked probable cause to believe that a crime was taking place because the First Amendment protected Katz' demonstration. However, in its February 24, 1997 Order, this Court expressly found that the constitutional rights of protestors on the base were not well defined at the time of the base conversion celebration. The Court stated:

> In light of the transitional state of the Presidio on September 24, 1994, the Court finds that the Constitutional rights of protestors at the base were not well settled on that date. Because the rights of protestors at the Presidio were not well established on the date in question, a reasonable military officer could have concluded that preventing protests at the base was Constitutional.

February 24, 1997 Order at 10 (footnote omitted). If a reasonable officer could have concluded that protests on base were unlawful on the day in question, then the officers had probable cause to believe that Katz was about to commit a crime when he approached the barricade carrying a banner. Accordingly, the decision to apprehend Katz did not amount to a Fourth Amendment violation.

B. Use of Force

Regardless of whether Katz's arrest was supported by probable cause, defendants may have acted in violation of the Fourth Amendment if they used excessive force to effectuate the arrest. A free citizen's section 1983 claim that law enforcement officials used excessive

force in the course of seizing the person is analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). The question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id.* at 397.

Following *Graham*, in deciding a claim of excessive force, the Ninth Circuit considers the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1991).

According to Katz, after he placed the banner over the barrier, "[s]omebody grabbed me from behind, and somebody else tore the banner away." Katz. Decl. 37:14-15. He explains the incident as follows:

> Basically, I just held the banner in place so that Vice President Gore could see it, as well as give it a chance to unfold itself, because it never really, I don't believe, totally unfolded. Before it unfolded—this thing happened really quick. So, I think it unfolded about half down, or something like that. And then I just held it in place while I think they had their arms around me, or one of them had their arms around me. ¶

Katz Depo. at 38:1-10. Katz was then removed from the crowd:

> . . . I think each one of them took an arm, and they sort of started sort of picking me up and kind of walking me out, kind of like very hurriedly, sort of like the bum's rush: Let's just get this guy out of here.

Katz Depo. at 38:11-15. Katz states that once he reached the van, he was "shoved" into the van:

> I managed to kind of prevent myself from—as it was happening, it was like flashing that I was—my head was going to smash down, or I was going to go full length into—with my head going into the end of the van, and I was able to stop the downward and the forward motion by just catching myself so that I didn't smash myself.

Katz Depo. at 41:17-23.

Defendants offer a markedly different description of the events in question. Officer Parker states that he approached Katz as Katz was reaching into his jacket. Parker Depo. at 42:25-26. Parker claims that he than put his "arms around [Katz], and [Katz] put both his arms onto the barricade. And I was trying to pull him up from the barricade, and he wasn't letting go." *Id.* at 42:26-43:4.

According to defendants, once the officers removed Katz from the barricade, Parker and Saucier "escorted him back approximately 50 yards" to the van stationed nearby. Parker Depo. at 46:24-26. Defendant Saucier states that plaintiff resisted going into the van "by sticking his legs up on the bumper and pushing away. So we had to use our heads putting him in the back of the vehicle." Saucier Depo. 18:14-17.

Defendants claim that the use of force was justified because at the time of the arrest, they were concerned for the safety of the public and for the speakers. Sergeant Parker asserts that he approached Katz as Katz began moving toward the barricade and putting his hand inside his jacket. Parker Depo. at 42:3-6, 25-26. Parker states that he was concerned for the safety of the persons attending the ceremony. He explains that he perceived it to be his duty to ensure "the safety of the Vice President and personnel there" and particularly "to ensure that if this individual was trying to do something, pull a gun out or anything like that, I was there to ensure that that did not happen." *Id.* at 43:11-16.

The evidence suggests that defendants overstate the risk of danger posed by Katz. At the outset, the Court notes that Parker's testimony directly conflicts with Katz's statement that he approached the barrier only *after* removing the banner from his jacket. *See* Katz Decl. at 36:5-11 (stating that he "stood up, opened the banner up, unfolded the banner, and walked to the barrier"). Defendants' own testimony further undercuts their characterization of the risk posed by Katz. Parker states that he had been warned of the possibility of demonstrations on the morning of the event. Parker Depo. at 40. Saucier's testimony suggests that defendants identified Katz in particular as a potential protestor. Saucier explained in his deposition, "Oh, I noticed [Katz] before we even—because he was pointed out as one of the potential, you know, activists. So we pretty much had a heads-up on him, sir." Saucier Depo. at 14. Saucier testified that Parker informed him "exactly who this person was" and that Parker identi-

fied Katz as "a possible activist" and "the person we need to keep on eye on." *Id.* at 14-15.

Moreover, the evidence now before the Court tends to contradict defendants' characterization of the physical threat posed by Katz. On the day of the event, Katz, a 60-year-old man, wore a brace on his leg because he had previously fractured his foot. Katz Depo. at 34:10-12. The brace extended from his foot up to a point just below his knee. *Id.* at 34:14-16. He was not wearing a shoe on the injured foot. *Id.* at 18-21. Finally, the Court notes Parker's statement that Katz did not overpower the officers at any time. Parker Depo. at 47:19-20. Based on this evidence, the Court finds that an issue of fact exists as to the nature of the risk presented by Katz.

The Court cannot conclude that the use of force was not excessive as a matter of law. The Court has reviewed the declarations and deposition testimony submitted by the parties, as well as a videotape of television news coverage of the events at the Presidio conversion ceremony. *See* Pls.' Exh. D attached to Pls.' Complaint. Viewed in a light most favorable to plaintiffs, the videotape shows two officers, on each side of Katz, removing him from the crowd and carrying or pulling him toward the van. Once they arrive at the van, the officers push Katz into the van. Given the nature of the crime at issue and the circumstances surrounding the incident, the Court cannot conclude that the use of force was reasonable as a matter of law. A triable issue of act exists as to whether defendants employed excessive force in removing Katz from the crowd and placing him in the police van.

C. Qualified Immunity

Defendants contend that they cannot be held liable for a violation of Katz's Fourth Amendment rights because they are entitled to qualified immunity. Under the doctrine of qualified immunity, officers "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 457 U.S. 818 (1982). Even in the face of a clearly established constitutional right, police officers are entitled to qualified immunity if a reasonable police officer could have believed that the conduct involved was legal. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Thus the availability of qualified immunity depends upon the "'objective legal reasonableness' of the action . . . in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* (quoting *Harlow*, 457 U.S. at 818-19).

The Ninth Circuit has established a two-prong analysis to determine whether qualified immunity is appropriate. First, the district court must determine whether the law governing the official's challenged conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under the clearly established law, a reasonable officer could have believed the conduct was lawful. *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

1. Clearly Established

The Court must first decide whether defendants' acted in violation of clearly established law governing plaintiffs' constitutional rights. For qualified immunity purposes, "[t]he contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable officer would understand that what he is doing would violate the law." *Mendoza*, 27 F.3d at 1361 (citing *Anderson*, 483 U.S. at 640). It is clearly established that the use of excessive force in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure.[1] *Chew v. Gates*, 27 F.3d 1432, 1457 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995), (citing *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986)).

2. Reasonable Officer

The next step is to determine whether, under the clearly established law, a reasonable officer could have believed that defendants acted lawfully with regard to the degree of force used to remove Katz from the crowd and place him inside the van. *See Liston*, 120 F.3d at 975; *Mendoza*, 27 F.3d at 1360; *Act Up!*, 988 F.2d at 871.

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[1] Plaintiffs contend that the relevant question is whether the defendants acted in violation of clearly established law governing plaintiffs' First Amendment rights. The Court rejects this approach for two reasons. First, the Court has already concluded that the law regarding the First Amendment rights of protestors was not clearly established on the day in question. Moreover, whether defendants are entitled to qualified immunity on the excessive force claim does not depend on whether the First Amendment rights of the protestors were well settled. To the contrary, the issue is whether the law regarding the use of force is clearly established.

In the Fourth Amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits. *Hopkins*, 958 F.2d at 885 n.3. The Court must consider whether the totality of the circumstances justified the particular type of seizure. *See Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). As recited above, the Court finds a question of fact regarding whether a reasonable officer could believe defendant's use of force was lawful. *See infra* Section IIB. Defendants are therefore not entitled to summary judgment on the basis of qualified immunity.

D. The Participation of Defendants Mallory and Lee

Defendants Mallory and Lee contend that they are entitled to summary judgment on the Fourth Amendment claim because there is no evidence that either defendant participated in arresting Katz. A supervisor may be liable under section 1983 if (1) he was personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Mackinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995); *see also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)).

Defendant Mallory asserts that he played no role in the seizure of Katz. Mallory explains:

> I did not issue prior to the September 24, 1994 ceremony any general orders or guidance as to how potential protestors should be handled, nor was I consulted as to how the military police or secret service agents intended to respond to protest activity.

> I did not participate in any order to apprehend Mr. Katz.

Mallory Decl. at ¶ 5. Plaintiffs concede that there is little evidence of defendant Mallory's personal involvement in the events at issue. They state that "there is limited evidence that [General Mallory] personally participated in, or set off a chain of actions leading to the use of excessive force . . . " Pls.' Supp. Opp. at 10, n.5. In fact, plaintiffs offer no evidence to connect Mallory to the force used to detain Katz. In light of the absence of any facts to suggest that defendant Mallory was involved in the events in question, he cannot be held liable under section 1983 in this case. Defendant Mallory is therefore entitled to summary judgment on plaintiff's Fourth Amendment claim.[2]

Defendant Lee also seeks summary judgment on the theory that he played no role in the events at issue in this suit. He states that he was not present at the apprehension of plaintiff. At the time of the detention, Lee contends, he was in the "command cell" that had been set up on the Presidio to coordinate security for the event. Lee insists that he was not involved in the detention of Katz:

> Neither Sergeant Parker nor Private First Class Saucier sought instruction from me as to whether

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[2] Plaintiffs contend that Mallory should remain in the case "because he caused arrests in violation of the [F]irst [A]mendment to be made." Pls.' Supp. Opp. at 10, n.5. In its prior order, the Court granted summary judgment on the First Amendment claim in Mallory's favor on the basis of qualified immunity. *See* Order dated February 27, 1997. As a result, there is no reason for Mallory to remain in this case.

> to apprehend Mr. Katz, nor did I order them at any time to apprehend Mr. Katz.

Lee Decl. ¶ 5.

In contrast, plaintiffs contend Lee played a "direct role" and "set in motion a series of acts by others that brought about the excessive force applied" to plaintiff Katz. Pls.' Supp. at 8. The causal connection required to establish liability of a supervisor may be established by showing that the supervisor "set[] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986) (citing *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

Plaintiffs direct the Court's attention to evidence in the record that Lee instructed his subordinates on the morning of the base conversion celebration. Parker testified that he understood Lee to be responsible for the overall planning of the security for the event. Parker Depo. at 40. Similarly, plaintiffs rely on Saucier's testimony that he was following Lee's orders at the time he apprehended Katz. Saucier testified that the officers "knew exactly what we were supposed to do" because Lee "told us exactly how to handle the situation." Saucier Depo. at 26:10-14, 21-22. Plaintiffs have not, however, established the content of these instructions. There is no evidentiary basis to support plaintiffs' assertion that Lee's directions on the morning of the base conversion ceremony caused the alleged constitutional deprivation.

Plaintiffs also attempt to establish Lee's liability on the basis of his testimony reviewing the officers' ac-

tions. Lee testified at his deposition that he reviewed and approved of the officers' actions on the day in question:

> Q. And is it accurate that you talked to them afterwards and told them that they had done exactly what they were supposed to do an in a professional manner?
>
> A. Yes. And it was my standard operating procedure, that after any major event, I would conduct an after-action review with my military policemen and my soldiers, and we would cover the events that had transpired. [¶] And, yes, I felt they did an extremely good job and they were very professional and courteous in dealing with everyone in the general public.

Id. at 46:4-17. Lee's after-the-fact statements expressing approval of his subordinates' actions are insufficient to establish the requisite causal link to support the extension of liability in this case.

Plaintiffs also argue that Lee should be held liable for the unconstitutional actions of his staff because he was responsible for the placement of the vans near the site of the ceremony. Lee gave the following testimony at his deposition:

> Q. So it was understood from your orders to people there, that if someone was taken into custody at the site they were to be put into the van . . . ?
>
> A. That was one of the possible purposes that we could use that vehicle for. We had vehicles prepositioned in numerous areas.

Lee Depo. at 38:5-12. The Court rejects plaintiffs' contention that Lee's decision regarding the placement of the vans, and the possible use of those vans to detain individuals, caused the alleged violation of plaintiff's constitutional rights. Even assuming that Lee directed the use of the vans to detain individuals, nothing in the record supports the conclusion Lee *caused* the officers to employ excessive force in apprehending detainees.

Plaintiffs have proffered no evidence to suggest that Lee knew or should have known that he acted in a way that would cause others to violate Katz's Fourth Amendment rights. *See McRorie*, 795 F.2d at 783. As a result, plaintiffs have failed to establish a direct causal link between Lee's directions and the alleged constitutional violation. Lee therefore cannot be held liable under section 1983 for the acts of his subordinates.

III. CONCLUSION

For the reasons stated above, the Court hereby GRANTS IN PART and DENIES IN PART defendant Saucier's motion for summary judgment and GRANTS defendants Mallory and Lee's motion for summary judgment.

IT IS SO ORDERED.

Dated: May 15, 1998

/s/ D. LOWELL JENSEN
D. LOWELL JENSEN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-3466 DLJ

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS, PLAINTIFFS

v.

UNITED STATES, MAJOR CORBIN LEE, SERGEANT STEVEN PARKER, PRIVATE DONALD SAUCIER, GENERAL GLYNN C. MALLORY, DEFENDANTS

[Filed: Feb. 24, 1997]

ORDER

On February 5, 1997, the Court heard arguments on defendant Mallory and defendant Lee's motion for summary judgment. J. Kirk Boyd and David H. Williams appeared on behalf of plaintiffs; Elliot M. Katz and R. Joseph Sher appeared on behalf of defendants Major Lee and General Mallory. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS in part and DEFERS in part defendants' motion for summary judgment.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiffs are In Defense of Animals, an animal rights organization, and Elliot Katz, its 60-year-old president. Defendants are Major Corbin Lee, Commanding Officer for the Military Police in the Presidio; Lieutenant General Glynn C. Mallory, Jr., Commanding General of the Sixth United States Army; Sergeant Steven Parker, squad leader on duty September 24, 1994 in the Presidio; and Private First Class Donald Saucier, military police officer on duty September 24, 1994 in the Presidio.[1]

Plaintiffs filed their original complaint on September 29, 1994, seeking monetary damages as well as declaratory and injunctive relief. Plaintiffs allege that defendants violated their civil rights on September 24, 1994 while Katz was attending a public gathering at the San Francisco Presidio. Specifically, Katz alleges that on September 24, 1994 he was prohibited from placing a protest banner on a gate in front of the stage where Vice President Gore and others were speaking. Plaintiff Katz alleges that he was taken from the crowd, through the use of unnecessary and excessive force, and placed in a police van before ultimately being released without having charges filed against him.

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[1] Brian O'Neill, Superintendent of the Golden Gate National Recreation Area is also a defendant in this complaint. However, the complaint against Superintendent O'Neill arises from activities at the Presidio after it became a National Recreation Area and is therefore not relevant to the instant motion.

Vice President Gore's speech was part of base conversion celebration activities at the Presidio. By press release dated September 20, 1994 and other publicity, the National Park Service invited the public to attend an event to be held at the Presidio on September 24, 1994 "commemorating the Presidio's historic transfer from military post to national park" on October 1, 1994. Hundreds of people attended the event. Plaintiff Katz alleges that the banner was confiscated from him by defendants in order to prevent him and his organization from expressing sentiments critical of the treatment of animals in medical research to be conducted at the Presidio's Letterman Hospital.

Katz was sitting in the front of the crowd behind a gate which blocked the public from the stage. He alleges that as Vice President Gore began speaking about the Presidio becoming a "global learning center," Katz, without saying anything, removed a cloth banner approximately 4 feet by 3 feet which stated "Please Keep Animal Torture Out of Our National Parks" with the intent of displaying the banner by hanging it over the fence so that it could be read by Vice President Gore and the other speakers. Katz claims that before he could do so, a Military Police officer grabbed him from behind, ripped the banner out of his hands, grabbed him, and violently threw him into the police van. He was searched and handcuffed but never informed of the basis for his detention or cited with violation of any law or regulation. Katz alleges that he never received written notice of any restrictions on expressive activity at the Presidio during the September 24, 1994 event.

On February 15, 1995 the Court dismissed plaintiffs' damage claims against the United States and ordered

plaintiffs to file an amended complaint clarifying defendant Lee's role in the incident.

On March 22, 1995, plaintiffs filed a First Amended Complaint, which alleged additional facts relating to defendant Lee and named Lieutenant General Glynn Mallory, Sergeant Steven Parker, and Private First Class Donald Saucier as additional defendants.[2] Defendant Parker had not been served and is not before this Court. Defendants Mallory and Lee now move the Court for summary judgment on the grounds that 1) they are entitled to qualified immunity on the First Amendment cause of action; 2) they are not liable for the actions of the arresting officers; and 3) no First Amendment violation occurred.

B. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party

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[2] Plaintiffs inadvertently named the United States as a defendant in their amended complaint. They acknowledge that the United States has been dismissed from this case.

must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S . 317 (1986)); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the non-moving party the burden of raising genuine issues of fact by substantial evidence. *T.W. Electric*, 809 F.2d at 630 *citing Celotex*, 477 U.S. at 323; *Kaiser Cement*, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49 (2nd Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.*, 626

F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial. The standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "Whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

II. ARGUMENTS

A. Liability of Mallory and Lee

The first question presented is whether defendants Mallory and Lee can be held liable for the alleged violation of Katz's First and Fourth Amendment rights. Defendants argue that they cannot be held liable on the First Amendment cause of action because they are entitled to qualified immunity from liability and that they cannot be held liable on either cause of action because they were not responsible for the arresting officers' conduct.

1. Immunity of Mallory and Lee

Under the doctrine of qualified immunity, officers "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). However, even in the face of a clearly established constitutional right, police officers are entitled to qualified immunity if a reasonable police

officer could have believed that the conduct involved was legal. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038-39 (1987). Thus the availability of qualified immunity depends upon the "'objective legal reasonableness' of the action . . . in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 107 S. Ct. at 3038 (1987) (quoting *Harlow*, 102 S. Ct. at 2738-39).

The Ninth Circuit has described the proper analysis for determining whether qualified immunity is appropriate:

> First, the district court must determine whether the law governing the official's challenged conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under the clearly established law, a reasonable officer could have believed the conduct was lawful. This is a test of the 'objective reasonableness' of the defendant's actions."

Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994) (citations omitted).

1. Established law at the Time of the Challenged Conduct

a. Free Speech Fora

In *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Supreme Court recognized three distinct fora in First Amendment analysis: the "traditional" or "quintessential" public forum, the "designated" public forum, and the "non-public" forum.

The traditional public forum consists of places such as streets or parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used or [*sic*] purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45.

The designated public forum is a public place which the State has opened to the public for the purpose of expressive activity. *Perry*, 460 U.S. 37, 45 (1983). Intent is required to create a designated public forum: "The government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. 788, 802 (1985).

A nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46.

b. Regulations Permissible in Each Forum

If a facility is a traditional or designated public forum, the government may establish reasonable "time, place, and manner" restrictions on speech, but such restrictions must be (1) content-neutral;[3] (2) narrowly-tailored to further an important government interest; and (3) leave open ample alternative means of communication. *Perry*, 460 U.S. at 45; *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

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[3] If the regulations are content-based, they are subject to strict scrutiny and presumptively invalid. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992)

If a facility is a nonpublic forum, the government has a lesser burden, but must nonetheless show that the restrictions on First Amendment activity are reasonable and viewpoint-neutral. *Perry*, 460 U.S. at 46.

c. The Status of the Presidio

From the foregoing, it appears clear that the status of defendant's rights depends critically on whether the Presidio was a designed public forum or a non-public forum on the date in question. Generally, military bases are not traditional public fora. "A military base . . . is ordinarily not a public forum for First Amendment purposes even if it is open to the public." *United States v. Albertini*, 472 U.S. 675, 684 (1985). However, the Presidio, particularly on the day in question, was not a typical military base. As the late Judge Peckham wrote of the Presidio, "thousands of tourists visit the Presidio each month to inspect Fort Point, an historical monument, or to enjoy the open spaces and greenery the Presidio grounds provide." *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D.Cal. 1972).

While the public nature of the Presidio might not have sufficed to convert it into a designated public forum, the Presidio's invitation to the public on the day in question might well have done so. In a press release, the Golden Gate National Recreation Area stated that

> The public is invited to attend a special presentation by Vice President Al Gore at 10:00 a.m. on Saturday, September 24 at Pershing Square on the main post of the Presidio, San Francisco. The address will begin a week of activities commemorating the Presidio's historic transfer from military post to national park.

> The Vice President will speak about this one-of-a-kind base conversation and is expected to announce several new environmental initiatives. Other dignitaries scheduled to speak are Secretary of the Interior Bruce Babbitt, Senator Dianne Feinstein and Congresswoman Nancy Pelosi.

Thus, not only was the public expressly invited to the base, it was asked to participate in the process of moving the Presidio from military to civilian control. The conversion of the Presidio to a civilian park was a controversial development, and the Park's future was a matter of public concern, as was evidenced both by Dr. Katz's protest and by the presence of a number of prominent politicians at the event.

In light of the transitional state of the Presidio on September 24, 1994, the Court finds that the Constitutional rights of protestors at the base were not well settled on that date.[4] Because the rights of protestors at the Presidio were not well established on the date in question, a reasonable military officer could have concluded that preventing protests at the base was Constitutional. Therefore, the defendants are entitled to qualified immunity for the alleged deprivation of plaintiffs' First Amendment rights.

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[4] In reaching this conclusion the Court expresses no opinion on the merits of plaintiff's First Amendment complaint. For the reasons discussed in Section II.B., *infra*, a decision on this question is not now required.

2. Responsibility of Mallory and Lee

a. Connection to the Arrest

Generally, government supervisors are not subject to vicarious liability, but are liable only for their own conduct. *See, e.g., Monell v. Department of Social Services*, 436 U.S. 658, 694 n. 58. However, supervisors may be liable for failing to adequately train and/or supervise those under their control if it can be shown that the supervisors acted with "deliberate indifference" or "gross negligence." *See Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986). In *Bergquist*, the court reaffirmed that "the required causal connection between supervisor conduct and the deprivation of a constitutional right is established either by direct personal participation or by setting in motion a 'series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" *Id.* (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)). However, in a footnote the Court pointed out that a plan or policy on the part of supervisors "cannot be proved through reference to a single unconstitutional activity unless 'proof of the incident includes proof that it was caused by an existing unconstitutional . . . policy.'" *Id.* at 1370, n.9 (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)).

Here, the proof of a link between the arrest of Katz and the defendants consists of declarations by Lee and Mallory and a policy letter allegedly circulated by Mallory. The policy letter, dated May 4, 1994 (more than four months before the arrest of Dr. Katz) states in full:

> 1. Picketing, demonstrating, sit-ins, protest marches, political speeches and other acts of public persuasion (to include circulation of petitions for signature, distribution of political handbills, flyers, signs and carry placards) are prohibited by Army regulation and will not be conducted on the Presidio of San Francisco without permission.
>
> 2. No one shall enter or remain on this post for any of the above purposes and such entry will constitute a violation of Title 18 USC Sec. 1382, which provides in part that: "Whoever within the jurisdiction of the United States, goes upon any military . . . reservation, post, fort arsenal, yard, station for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months, or both."
>
> 3. You are hereby warned that violaters [sic] will be issued a citation to appear before the United States Magistrate. Application for permission to demonstrate may be made through the Command Executive Assistant.

Exhibit B to Plaintiffs' Opposition. A jury could reasonably conclude that Mallory's circulation of the base policy letter was an act which Mallory knew or should have known would lead to the violation of plaintiff Katz's First Amendment rights. This policy letter is thus sufficient to create a triable issue of fact as to Mallory's role in the alleged suppression of Dr. Katz's speech.[5] It does not, however, tie Mallory to the Fourth

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[5] Given the Court's conclusion that General Mallory is entitled to qualified immunity on the First Amendment claim, however, the conclusion that he can be tied to the incident is largely irrelevant.

Amendment violation, as the letter states that violators of the policy would be issued a citation, not arrested.

Plaintiffs also seek to rely on the affidavits of Lee and Mallory in which both men express the opinion that First Amendment activity was not permitted at the Presidio. It is not clear exactly how the subjective beliefs of Lee and Mallory led to the arrest of Dr. Katz, as there is no evidence that this belief was communicated to others. Plaintiffs further argue that "it is simply not believable that Private Saucier or Sergeant Parker issued the order to ban all first amendment activity on September 24, 1994." Opposition at 8: 11-12. This is exactly the sort of proof, the use of a single incident to show the existence of an unconstitutional policy, that was expressly prohibited in *Bergquist*.

There is thus nothing, other than Lee's position as commanding officer of the military police at the Presidio and his view on the Constitutionality of protests within the Presidio, to suggest that he participated in a plan or policy to deprive plaintiff Katz of his Constitutional rights.[6] Therefore, although the policy letter

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[6] In its opposition to defendants' motion to dismiss, incorporated by reference into its current opposition, plaintiff argues that Judge Armstrong's decision in *Veterans' Speakers Alliance v. Fowler*, C-91-4459 SBA is "on all fours" with the current suit. This interpretation of *Veterans' Speakers Alliance* is faulty. In that case, the court found that "defendant Fowler directly participated in the unlawful arrest of plaintiff by actually ordering their arrest at the scene and that defendant Harrison personally participated in the wrongful conduct by issuing the bar letters to plaintiffs." In contrast, here, the plaintiffs are wholly unable to make a showing of direct involvement by Lee and Mallory in the alleged Fourth Amendment violations.

creates a triable issue of fact with regards to Mallory's ties to the suppression of Dr. Katz's speech, there does not appear to be any evidence sufficient to tie either man to the arrest.

b. Rule 56(f)

Plaintiffs argue that if the Court finds that the causal link between these defendants and the arrest of Dr. Katz is not a triable issue, that the Court defer ruling on defendants' motion pursuant to rule 56(f). Rule 56(f) states that when a party opposing a motion for summary judgment has demonstrated

> that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Here, plaintiffs' attorney states by way of affidavit that he has been unable to depose the arresting officers because they have been stationed overseas during the pendency of this action. Counsel argues that the testimony of the men who made the arrest is instrumental in establishing whether Mallory and Lee played a role in the arrest and that plaintiffs cannot defend a motion for summary judgment without the opportunity to elicit this information.

Defendants oppose plaintiffs' Rule 56(f) argument on two grounds. First, they argue that plaintiffs have not been diligent in seeking discovery, and therefore cannot take refuge in Rule 56(f). *See, e.g., Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (1994) ("We will only find

that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment.") (emphasis in the original). Defendants maintain that plaintiffs' counsel has not attempted to depose any of the other relevant parties including defendants Lee, Mallory, or O'Neil. Furthermore, defendants maintain that Private Saucier has been stationed at West Point since Mid-December of 1996, and yet plaintiffs have made no attempt to depose him.[7] Plaintiffs' counsel answers that he has only recently learned that Private Saucier has returned to the United States. Furthermore, counsel contends that it makes no sense to take any depositions until those individuals who actually made the arrests have been deposed.

Second, defendants argue that plaintiffs have failed to demonstrate what evidence they expect to uncover and how this evidence will be relevant to the liability of Mallory and Lee. This objection is without merit. Plaintiffs clearly wish to interview the arresting officers in order to determine whether they had been instructed by Mallory and Lee to arrest any demonstrators at the Presidio on the day in question. Such evidence would directly rebut the claim by Mallory and Lee that they did not participate in the arrest of Dr. Katz, and is thus highly material.

The Court concludes that there is merit to the plaintiffs' Rule 56(f) motion. The testimony of Parker and Saucier is directly relevant to the question of

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[7] Sergeant Parker has still not been served in this action and is currently stationed in Germany.

Mallory and Lee's liability on the Fourth Amendment cause of action. Therefore, the Court will defer ruling on defendants' motion for summary judgment on the Fourth Amendment cause of action in order to permit plaintiffs to conduct additional discovery. Plaintiffs shall have sixty days from the issuance of this order to question Private Saucier and Sergeant Parker regarding the role of defendants Mallory and Lee in the arrest of Katz. The Court reminds counsel that such questioning need not necessarily be done by way of deposition, and that the plaintiffs may attempt to interview the relevant parties and provide their testimony by way of declaration.

Along with their additions to the factual record the plaintiffs may also file a supplemental memorandum in opposition to defendants' motion for summary judgment. This memorandum shall not exceed ten pages in length. No later than seven days after the plaintiffs file their additional papers, the defendants may file a supplemental reply, again not to exceed ten pages in length. The motion will then be under submission. No further hearing shall be held.

B. First Amendment Violation

Defendants argue that they are entitled to summary judgment on the issue of liability because the facts indicate that, as a matter of law, plaintiffs' First Amendment rights were not violated. The Court considered this issue in defendants' motion to dismiss but concluded that the record was insufficiently developed to analyze the issue.[8] The issue has now been fully

[8] Plaintiffs inexplicably misread the Court's October 3, 1995 order as deciding that a First Amendment violation occurred. The

briefed and supported by affidavits and exhibits. There do not appear to be any factual issues in dispute, and the issue of liability appears to come down to whether or not the Presidio was a public forum on the date in question.[9]

However, the Court finds that it need not decide whether or not there was a First Amendment violation in this case. Because the Court has already decided that defendants Mallory and Lee are entitled to qualified immunity on the alleged First Amendment violations, defendants' motion for summary judgment on the merits of those allegations is rendered moot.

III. CONCLUSION

For the reasons specified above, the Court orders the following:

1) Defendants' motion for summary judgment on the First Amendment cause of action on the basis of qualified immunity is hereby GRANTED, as the First Amendment rights of the plaintiffs were not well-settled on the date in question.

2) Pursuant to F.R.Civ.P. 56(f), the Court DEFERS ruling on defendants' motion for sum-

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Court was quite clear in stating that it did not have sufficient information before it to rule on the Constitutionality of the officers' conduct. Thus, plaintiffs' argument that defendants' motion for summary judgment is barred by the Law of the Case doctrine is rejected.

[9] Again, the plaintiffs badly misread prior proceedings on this question. Plaintiffs maintain that the settlement agreement entered into in *Veterans Speakers Alliance, et al. v. Fowler, et al.*, C 91 4459 SBA conclusively establishes that the Presidio is a public forum. In fact it does nothing of the sort. The stipulation agreed to by the parties in that case simply stated that in some circumstances military bases can become public fora.

mary judgment on the Fourth Amendment Cause of Action pending addition [sic] submissions by the parties.

3) Finally, the Court does not reach the merits of the defendants' motion for summary judgment on the First Amendment cause of action.

IT IS SO ORDERED.

Dated: February 24, 1997

/s/ D. LOWELL JENSEN
D. LOWELL JENSEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-3466 DLJ

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,
PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS

[Filed: June 27, 1996]

ORDER

On May 8, 1996, the Court heard arguments on plaintiffs' motion for declaratory relief and partial summary judgment. J. Kirk Boyd of Boyd, Huffman, Williams & Urla appeared on behalf of plaintiffs. R. Joseph Sher of the Department of Justice appeared on behalf of defendants. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiffs' motion.

I. BACKGROUND

A. Procedural History

Plaintiffs are In Defense of Animals, an animal rights organization, and Elliot Katz, its 60-year-old president. Defendants are the United States of America; Major Corbin Lee, Commanding Officer for the Military Police in the Presidio; Lieutenant General Glynn C. Mallory, Jr., Command General of the Sixth United States Army; Sergeant Steven Parker, squad leader on duty September 24, 1994 in the Presidio; Private First Class Donald Saucier, military police officer on duty September 24, 1994 in the Presidio; and Brian O'Neill, Superintendent of the Golden Gate National Recreation Area.

Plaintiffs filed their original complaint on September 29, 1994, seeking damages, declaratory relief, and injunctive relief. Plaintiffs claim that defendants violated their civil rights on September 24, 1994 during a public gathering at the San Francisco Presidio. Specifically, plaintiff Katz alleges that on September 24, 1994, he was prohibited from placing a protest banner on a gate in front of the stage where a speech by Vice President Gore and others was being given. Plaintiff Katz also alleges that he was taken from the crowd, using unnecessary and excessive force, and placed in a police van before being ultimately released without having charged filed against him.

The speech in question was given to the public as part of base conversion celebration activities. By press release dated September 20, 1994 and other publicity, the National Park Service invited the public to attend

an event to be held at the Presidio on September 24, 1994 "commemorating the Presidio's historic transfer from military post to national park" on October 1, 1994. Hundreds of people attended the event. Plaintiff Katz alleges that the banner was confiscated from him by defendants to prevent him and his organization from expressing sentiments critical of the treatment of animals in medical research to be conducted at the Presidio's Letterman Hospital.

On September 24, 1994, the date of the original incident, the Presidio was still a military installation.[1] On Wednesday, September 28, 1994, the National Park Service faxed plaintiffs a copy of their regulations regarding "First Amendment activity" for the Presidio's base conversion celebration on October 1, 1994. The regulations required plaintiffs to apply for a petition before engaging in First Amendment activities, and restricted such activities to four designated areas.

On September 29, 1994, plaintiffs sought a temporary restraining order asking the Court to enjoin defendants from preventing plaintiffs from distributing leaflets and materials at any of the public events at the Presidio on October 1, 1994. Plaintiffs claimed that the entire Presidio was a "public forum," and that the restrictions on speech were invalid. Defendants claimed that certain so-called "military footprint" areas of the Presidio were nonpublic fora, and that restrictions on speech were valid time, place, and manner restrictions.

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[1] On October 1, 1994, the Presidio became part of the National Park Service.

In light of the government's representation that it would provide five additional designated areas within the Presidio for plaintiffs to engage in leafletting and other free speech activities on October 1, 1994, the Court denied plaintiff's motion for a temporary restraining order. In an Order dated November 2, 1994, the Court explained in more detail its reasoning for denying the TRO. The Court concluded that plaintiffs had raised valid arguments as to the unconstitutionality of the Presidio regulations, but had not met the strict standard required for granting a TRO.

On March 22, 1995, plaintiffs file a First Amended Complaint, which alleged additional facts relating to defendant Lee and named Lieutenant General Glynn Mallory, Sergeant Steven Parker, and Private First Class Donald Saucier as additional defendants. The first claim in the First Amended Complaint alleges that the defendants acted to unlawfully restrict plaintiffs' First Amendment activity at a designated public forum and mistreated plaintiffs because of the content of their speech. Plaintiffs' second claim alleges that the defendants violated plaintiff Katz's fourth amendment right to be free from unreasonable searches and seizures and the use of excessive force.

Defendants moved to dismiss the damages claims or, in the alternative, for summary judgment on two separate grounds: (1) that plaintiffs' claims fail to state sufficient facts to satisfy the heightened pleading rule; and (2) that defendants are entitled to qualified immunity. At the same time, plaintiffs sought a declaration from this Court as to the legality of the Presidio's regulations (1) that "No First Amendment activities are permitted within any areas [of the Presidio]

permitted to the U.S. Army" because the area is not a public forum, and (2) that all "First Amendment Activities" are restricted to certain designated areas and that permits to conduct First Amendment activities may be denied at the discretion of the Superintendent.

In an order dated October 3, 1995, the Court dismissed plaintiffs' Fourth Amendment damages claim against Mallory with leave to amend by October 25, 1995. In all other respects, the Court denied defendants' motion to dismiss. In the same order, the Court also denied plaintiffs' motion for partial summary judgment and declaratory relief, finding that plaintiffs were not entitled to a declaratory judgment that the Park Service's restrictions on the location of demonstrations and leafletting are per se invalid as a matter of law and that application of the restrictions would have to be judged on a case-by-case basis.

B. The October 1, 1994 Event

The current motion for summary judgment challenges the Park Service's regulation as applied to plaintiffs at the Presidio's base conversion celebration on October 1, 1994. According to plaintiffs, the areas designated by the Park Service for plaintiffs to pass out literature regarding the use of Presidio's Letterman Hospital were out of sight and out of reach of the individuals who took the Letterman tour. Plaintiffs also allege, and defendants concede, that the Park Service treated plaintiffs differently than the event "co-sponsors" who were allowed to hand out leaflets and set up booths in the main event area.

Plaintiffs ask this Court to declare that: (1) future regulation of First Amendment activities cannot provide greater access to sponsors than to plaintiffs and other non-sponsors; (2) defendants' governmental interest in protecting potentially unwilling listeners from being "hassled" with leaflets is not sufficient reason to justify time, place and manner restrictions; and (3) any regulation of First Amendment activity to designated areas must occur evenhandedly and provide for close proximity to the stream of pedestrian traffic. In response, defendants argue that (1) the law of the case doctrine precludes this Court from deciding the issues in plaintiffs' motion; (2) plaintiffs do not have standing to secure First Amendment declaratory relief; (3) the Park Service's restrictions are valid time, place and manner regulations; and (4) further discovery may be necessary pursuant to Rule 56(f).

II. DISCUSSION

A. Law of the Case Doctrine

The law of the case doctrine does not bar this Court from hearing and deciding plaintiffs' present summary adjudication motion. In general, the law of the case doctrine prevents courts from "reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Securities Investor Protection Corp. v. Vigman*, 74 F.3d 932, 937 (9th Cir. 1996) (quoting *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). For the doctrine to apply, however, "the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *Id.*

In this case, plaintiffs present new evidence and legal theories which were not available or before the Court in the previous summary judgment motion. Specifically, plaintiffs raise two new legal arguments based upon the deposition testimony of Superintendent Brian O'Neill and the written discovery responses of defendants. Because these new legal arguments were not addressed explicitly or by necessary implication in the prior summary judgment motion, the law of the case doctrine does not apply.

Moreover, the Court's October 1995 order denying summary judgment was not a final decision subject to the law of the case doctrine. As local rule 56-3 emphasizes:

> Statements contained in an order of the court denying a motion for summary judgment or summary adjudication shall not constitute issues deemed established for purposes of the trial of the case, unless the court so specifies.

Civ. L.R. 56-3. "[U]ntil entry of judgment, [Rule 56(a) decisions] remain subject to change at any time. The doctrine of the law of the case does not limit the power of the court in this respect." IB *Moore's Federal Practice 2d*, Law of the Case, ¶0.404[2] at 124. Because the October 1995 order did not result in the entry of judgment, the law of the case doctrine does not prevent this Court from exercising its broad authority to revisit issues discussed in that order.

B. Standing

The Article III constitutional prerequisites to standing are (1) an injury in fact which is concrete and not conjectural; (2) a causal connection between the injury

and defendant's conduct or omissions, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). The burden of establishing standing rests with the party invoking federal jurisdiction. *Id.*

Defendants argue that plaintiffs lack standing because the [sic] they have failed to satisfy the injury prong of the constitutional standing test. Where equitable relief from future conduct is sought, a litigant must demonstrate "a credible threat of future injury." *Presbyterian Church v. United States*, 870 F.2d 518, 528-29 (9th Cir. 1989) (citations omitted). Defendants argue that plaintiffs have no standing to request declarative relief addressing defendants' future regulation of First Amendment activities because they have failed to demonstrate that they are "realistically threatened by a repetition of [their past] experience." *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Plaintiffs respond that they have standing because the underlying dispute between the parties is "capable of repetition, yet evading review." *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Presbyterian Church*, 870 F.2d at 528 (9th Cir. 1989).

Because of the First Amendment context, the standing issue presents a close question in this case. Courts often apply relaxed standing rules to First Amendment challenges to prevent chilling protected speech. *See Blair v. Shanahan*, 38 F.3d 1514 (9th Cir. 1994) (citing *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989) and *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984)). At a minimum, however, courts generally require that a plaintiff demonstrate a desire to continue to engage in the First Amendment

activity proscribed by the challenged regulation and some reasonable likelihood that a similar opportunity to engage in that activity will arise. *See Blair*, 38 F.3d at 1519 (holding that plaintiff's "First Amendment claim for a declaratory judgment is moot if he no longer wishes to engage in activity proscribed by the challenged statute"); *Golden v. Zwickler*, 394 U.S. 103, 106 (1969) (finding no standing when plaintiff no longer wished to distribute handbills because the member of Congress who was the target of the campaign was no longer running for office); *Steffel v. Thompson*, 415 U.S. 452 (1974) (remanding for district court to determine whether petitioner still desired to engage in handbilling since the American involvement in Vietnam had subsided).

Although plaintiffs have demonstrated a desire to continue to participate in First Amendment activity, on this record the Court cannot find that plaintiffs have demonstrated a reasonable likelihood that they will be presented with a similar opportunity to engage in that activity in the future. Plaintiffs fail to point to any evidence that they have sought or plan to seek accommodation of the exercise of their First Amendment rights at any particular future Presidio event. Moreover, they fail to present evidence that any organized events are planned at the Presidio in the foreseeable future. Instead, they note only that the future of the Presidio, especially the use of Letterman Hospital, has not been resolved and that they intend to "continue to voice their opinion and participate in public events in the Presidio."

This Court can only speculate about the possibility of injury to plaintiffs from a future application of the Park

Service's First Amendment restrictions. Although plaintiffs point to deposition statements by Superintendent O'Neill indicating that defendants will continue [sic] have sponsors and non-sponsors at future events, there is no certainty that conditions at future public events will mirror those which existed on October 1, 1994 or, indeed, that future events governed by Park Service regulations will even occur.[2] In sum, given the precarious position of the Park Service at the Presidio and the unique nature of the October 1, 1994 event, this Court cannot say with any certainty that the Park Service regulations will ever again be applied, much less applied to plaintiffs in the same manner and under the same circumstances as existed on October 1, 1994.

Each event at the Presidio has a different purpose and different logistics, and poses a different set of challenges for Park Service personnel charged with the responsibility of applying any restrictions on First Amendment activity. Despite the different circumstances surrounding each event, however, a few general guidelines always will apply: persons wishing to distribute First Amendment literature must be permitted to reach the event audience, and any restrictions on their ability to leaflet within the Park must be both content-neutral and narrowly tailored. *See Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also*

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[2] At the hearing on this matter, defendants informed the Court that the Park Service's tenure as operator of the Presidio may be limited.

Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) ("an alternative is not ample if the speaker is not permitted to reach the intended audience"). Moreover, when an event in the Presidio focuses on a topic of public concern, the government must be particularly careful to neutrally apply any restrictions on First Amendment activity. As the *Turner Broadcasting* decision emphasized:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rests upon this ideal. (citations omitted) Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

114 S. Ct. at 2458.

Beyond these general constitutional guidelines, as this Court has already ruled, the application of Park Service regulations must be judged on a case-by-case basis.

III. CONCLUSION

For the reasons discussed above, the Court finds that plaintiffs have failed to meet their burden of demonstrating standing to request the declaratory relief

sought. Plaintiffs' motion for declaratory relief is DENIED.

IT IS SO ORDERED.

Dated: June 27, 1996

/s/ D. LOWELL JENSEN
D. LOWELL JENSEN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16298
D.C. No. CV-94-03466-DLJ

ELLIOT M. KATZ; IN
DEFENSE OF ANIMALS, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA; CORBIN LEE, MAJOR;
BRIAN O'NEILL; STEVEN PARKER, SERGEANT;
GLYNN C. MALLORY, JR., GENERAL, DEFENDANTS
AND
DONALD SAUCIER, PRIVATE, DEFENDANT-APPELLANT

[Jan. 10, 2000]

ORDER

Before: THOMPSON and GRABER, Circuit Judges, and CARROLL, District Judge*

The panel has voted to deny appellant's petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Thompson and Carroll have recommended denial of the petition for rehearing en banc.

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* The Honorable Earl H. Carroll, United States Senior District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.